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# WRONGFUL LIFE AND WRONGFUL BIRTH: MEDICAL MALPRACTICE IN GENETIC COUNSELING AND PRENATAL TESTING

THOMAS DEWITT ROGERS, III\*

## I. INTRODUCTION

In the fifteen years following the seminal case of *Gleitman v. Cosgrove*,<sup>1</sup> numerous courts have considered the perplexing problems raised by claims predicated on "wrongful life"<sup>2</sup> or "wrongful birth."<sup>3</sup> The theoretical bases of these actions are closely related, and they reflect the respective medical malpractice claims of a congenitally deformed child and his parents against a physician or other medical personnel for failure accurately to advise, counsel, and test the mother concerning the particular fetal risks at issue.

The judicial reaction to these two causes of action, however, has been remarkably disparate. Indeed, in the flurry of judicial

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1. 49 N.J. 22, 227 A.2d 689 (1967)(overruled in part by *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979)).

2. In a "wrongful life" claim,

[t]he child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the *birth of* the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.

Comment, 54 TUL. L. REV. 480, 485 (1980)(emphasis in original). See, e.g., *Phillips v. United States (Phillips I)*, 508 F. Supp. 537 (D.S.C. 1980); *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). See notes 15-23 and accompanying text *infra*.

3. A "wrongful birth" claim is an action brought by the parents against "a physician [who] failed to inform . . . [them] of the increased possibility that the mother would give birth to a child suffering from birth defects . . . [, thereby precluding] an informed decision about whether to have the child." Comment, 8 HOFSTRA L. REV. 257, 257-58 (1979). See, e.g., *Phillips v. United States (Phillips II)*, 508 F. Supp. 544 (D.S.C. 1981); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). See notes 193-205 and accompanying text *infra*.

activity since 1975,<sup>4</sup> two distinct and ostensibly inconsistent trends can readily be discerned: first, with the exception of the intermediate appellate courts in two jurisdictions,<sup>5</sup> the courts have invariably refused to recognize wrongful life claims;<sup>6</sup> and second, while some of the earlier wrongful birth cases denied recovery,<sup>7</sup> the jurisdictions that have reached the merits of this question are presently unanimous in their recognition of wrongful birth claims.<sup>8</sup> This divergence of judicial response is most frequently ascribed to fundamental conceptual differences between the two causes of action, particularly in the area of damages,<sup>9</sup> but other possible explanations include theological or philosophical disapproval of abortion,<sup>10</sup> the inherent "cultural lag" between technological advancements and popular morality,<sup>11</sup> and the current unavailability of *in utero* treatment techniques, short of eugenic abortion,<sup>12</sup> for certain congenital defects.<sup>13</sup> This

4. See notes 23 & 204 *infra*.

5. *Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477; *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom. Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

6. *E.g.*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895. See notes 117 & 118 and accompanying text *infra*.

7. *E.g.*, *Gleitman*, 49 N.J. 22, 227 A.2d 689; *Johnson v. Yeshiva Univ.*, 53 A.D.2d 523, 384 N.Y.S.2d 455, *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

8. *E.g.*, *Berman*, 80 N.J. 421, 404 A.2d 8; *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895. See note 271 and accompanying text *infra*.

9. See, *e.g.*, *Gleitman*, 49 N.J. at 29, 227 A.2d at 692; *Becker*, 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. As stated by the court in *Gleitman*, "[b]y asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies." 49 N.J. at 29, 227 A.2d at 692.

10. See notes 302-321 and accompanying text *infra*.

11. *Peters & Peters, Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 Duq. L. Rev. 857, 871-76 (1980). See *Phillips I*, 508 F. Supp. at 543.

12. "An abortion undertaken to prevent the birth of a genetically defective child is term[ed] 'eugenic' while one to prevent harm to the mother-to-be is termed 'therapeutic.'" *Curlender*, 106 Cal. App. 3d at 816 n.6, 165 Cal. Rptr. at 480 n.6 (citing *Speck v. Finegold*, 268 Pa. Super. Ct. 342, 348 n.4, 408 A.2d 496, 499 n.4 (1979)).

13. See *Phillips I*, 508 F. Supp. at 543 n.12; *Smith v. United States*, 392 F. Supp. 654, 655 (N.D. Ohio 1975). Indeed, the unavailability of *in utero* treatment techniques for the congenital defects most frequently associated with wrongful life claims may constitute the most significant distinction between such claims and other prenatal torts. *Phillips I*, 508 F. Supp. at 543 n.12. See notes 320 & 321 and accompanying text *infra*.

article examines the historical development and theoretical underpinnings of wrongful life and wrongful birth claims in an effort to clarify the complex issues that the courts have addressed and the troublesome questions they have failed to confront.

## II. WRONGFUL LIFE

### A. Background

At the outset, "[a] clear delineation of certain terminological distinctions is essential to a proper understanding of the theoretical issues raised by [birth-related claims] . . . [and] to the development of a functional analytic framework."<sup>14</sup> Unfortunately, the difficulties presented by this categorization process have been compounded by haphazard use of the available terminology, both in the cases and the commentary, that fails adequately to distinguish factually and legally dissimilar claims. A wrongful life claim, which is brought by or on behalf of an infant who suffers from a genetic or other congenital<sup>15</sup> defect, alleges that the physician, in negligently failing accurately to advise, counsel, and test the plaintiff's parents concerning genetic or teratogenic risks to potential offspring suggested by maternal age, family history, or other circumstances, has breached the applicable standard of medical care and precluded an informed parental decision to avoid the plaintiff's conception or birth. Most wrongful life claims are premised on postconception negligence by the physician; for example, in Down's syndrome cases,<sup>16</sup> the infant-plaintiff generally alleges that subsequent to the diagnosis

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14. *Phillips II*, 508 F. Supp. at 545 n.1.

15. A congenital defect is one "[e]xisting at, and usually before, birth . . .," DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 298 (26th ed. 1981); the term refers generally "to conditions that are present at birth, regardless of their causation." *Id.* Many of these defects are hereditary, meaning that they are genetically transmitted or have a genetic etiology, see generally W. FUHRMANN & F. VOGEL, GENETIC COUNSELING (2d ed. 1976), such as Down's syndrome (mongolism) and Tay-Sachs disease. See notes 77 & 102 *infra*. Some congenital defects are not hereditary, however, but are instead caused by the exposure of a healthy fetus to certain environmental factors, such as maternal dietary deficiencies, radiation, maternal infections, and chemical agents. W. HAMILTON & H. MOSSMAN, HUMAN EMBRYOLOGY 206 (4th ed. 1972); J. LANGMAN, MEDICAL EMBRYOLOGY 109-10 (4th ed. 1981). The most common congenital defect of this type, at least in the context of birth-related claims, is rubella syndrome or congenital rubella, a group of fetal impairments caused by the infection of a pregnant woman with rubella (German measles). See note 39 *infra*.

16. See note 77 *infra*.

of pregnancy, the physician failed to advise the prospective parents of the increased possibility that their child would be afflicted with the genetic defect because of advanced maternal age<sup>17</sup> or family history<sup>18</sup> and failed to inform them of the testing procedures<sup>19</sup> available to determine whether the fetus was so afflicted. Some wrongful life claims have, however, been based at least partially on a physician's negligent failure accurately to perform genetic screening tests on potential parents<sup>20</sup> or correctly to inform them of the hereditary nature of disorders evident in previous children.<sup>21</sup> Nevertheless, whether predicated on preconception or postconception medical malpractice, wrongful life claims can be distinguished from other birth-related actions by their fundamental premise: but for the physician's negligent failure to advise the plaintiff's parents concerning foreseeable fetal risks and available testing procedures or failure accurately to administer those tests, the parents would have reached an informed decision to avoid the conception or birth of the plaintiff, and the lifetime of suffering inflicted on him by his condition would have been prevented.

As expressed by one court, the essential postulate of any wrongful life claim is the "right of a child to be born as a whole, functional human being."<sup>22</sup> Presently, sixteen cases<sup>23</sup> in eight ju-

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17. *E.g.*, *Berman v. Allan*, 80 N.J. 421, 425, 404 A.2d 8, 10 (1979). Medical studies have indicated that "about 60% of all mongoloid babies are born to mothers above 35 years of age." NATIONAL ACADEMY OF SCIENCES, GENETIC SCREENING 134 (1975). See note 78 *infra*.

18. *E.g.*, *Phillips I*, 508 F. Supp. 537 (D.S.C. 1980)(mother's sister afflicted with Down's syndrome); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (mother had previously given birth to child afflicted with Down's syndrome).

19. The most important postconception genetic testing procedure is amniocentesis, which "consists of puncturing the anesthetized abdominal wall with a needle and withdrawing . . . a small amount of the amniotic fluid from the amniotic sac. The [fetal] cells in the fluid are used immediately for diagnosis or are cultivated for later diagnosis." C. STERN, PRINCIPLES OF HUMAN GENETICS 808-09 (3d ed. 1973). See notes 44-47 and accompanying text *infra*.

20. See *Curlender*, 106 Cal. App. 3d 811, —, 165 Cal. Rptr. 477, 480 (Ct. App. 1980)(possible negligent performance of screening test for Tay-Sachs disease).

21. *Park*, 60 A.D.2d 80, 81, 400 N.Y.S.2d 110, 111 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978)(parents misinformed that chances of having a second child afflicted with infantile polycystic kidney disease were "practically nil" inasmuch as the disease was not hereditary"). See *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981) (failure to diagnose cystic fibrosis in previous child).

22. *Park*, 60 A.D.2d at 88, 400 N.Y.S.2d at 114. This premise has also been de-

risdictions have addressed claims within this definition of wrongful life.

Much of the confusion concerning the precise meaning of wrongful life results from the New Jersey Supreme Court's appropriation of that term, in *Gleitman v. Cosgrove*,<sup>24</sup> from an earlier line of cases that used it to describe an action brought by a healthy child alleging illegitimacy as his sole injury.<sup>25</sup> "Wrongful life" was first employed to describe this type of action in *Zapeda v. Zapeda*,<sup>26</sup> in which the plaintiff sued his biological father for

scribed as the right to be born healthy, Comment, 27 BUFFALO L. REV. 537, 537 (1978), and more broadly, as the right not to be born. *Gleitman*, 49 N.J. at 63, 227 A.2d at 711. See *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978). Cf. *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960) (in the context of a prenatal tort case, the court stated that a "child has the right to begin life with a sound mind and body").

23. *Phillips I*, 508 F. Supp. 537 (D.S.C. 1980); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975) (applying Texas law); *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981); *Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Berman*, 80 N.J. 421, 404 A.2d 8 (1979); *Gleitman*, 49 N.J. 22, 227 A.2d 689 (1967) (overruled in part by *Berman*); *Becker*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), modified, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Park*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), modified sub nom. *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895; *Johnson*, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976), aff'd, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Greenberg v. Klot*, 47 A.D.2d 765, 367 N.Y.S.2d 966 (1975) (mem.) leave to appeal denied, 37 N.Y.2d 707, 375 N.Y.S.2d 1026 (1975) (facts summarized in *Park*, 60 A.D.2d at 93, 400 N.Y.S.2d at 116-18 (Titone, J., dissenting)); *Stewart*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), modified, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), aff'd mem., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). See *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978) (action barred by statute of limitation); *Jacobs*, 519 S.W.2d at 849 (dicta).

24. 49 N.J. 22, 227 A.2d 689 (1967).

25. See *Tedeschi, On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966), reprinted in 7 J. FAM. L. 465 (1967). "Wrongful life" was first employed to describe this type of action in *Zapeda v. Zapeda*, in which the plaintiff sued his biological father for inducing his mother to engage in sexual relations based on a false promise of marriage and asserted that various damages flowed from the stigma of bastardy imposed on the plaintiff by these circumstances. 41 Ill. App. 2d 240, 245-46, 259, 190 N.E.2d 849, 851, 858 (1963), cert. denied, 379 U.S. 945 (1964). Claims of this type have typically been brought against the father. *Pinkney v. Pinkney*, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (counterclaim). They have, however, also been premised on the conduct of third parties. E.g., *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), rev'd, 25 A.D.2d 907, 269 N.Y.S.2d 786 (1966), aff'd, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (claim predicated on alleged negligence of state employees in failing to prevent the rape of plaintiff's institutionalized mother).

26. 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858 (1963), cert. denied, 379 U.S. 945

inducing his mother to engage in sexual relations based on a false promise of marriage.<sup>27</sup> The plaintiff asserted that various damages flowed from the stigma of bastardy imposed upon him by these circumstances. Claims of this type have typically been brought against the father,<sup>28</sup> but they have also been premised on the conduct of third parties.<sup>29</sup> Despite frequent use of the term "wrongful life" to describe these claims,<sup>30</sup> they do not fall within the present definition of that term<sup>31</sup> and "are now most commonly referred to as 'dissatisfied life' cases . . . ."<sup>32</sup> Although dissatisfied life claims are distinguishable from wrongful life claims "with respect to the duties and injuries at issue,"<sup>33</sup> the actions exhibit certain similarities with respect to calculation of damages.<sup>34</sup> To at least some extent, a comparison of "impaired life" with nonexistence is therefore necessary.

Another category of cases frequently, though imprecisely, denominated wrongful life actions can perhaps best be described as a filial claim that corresponds to the parental cause of action for "wrongful pregnancy."<sup>35</sup> If the negligent performance of a sterilization or contraceptive procedure results in the birth of an unplanned child, the parents' cause of action is one for wrongful

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(1964).

27. *Id.* at 245-46, 190 N.E.2d at 851.

28. *Pinkney v. Pinkney*, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974)(counterclaim).

29. *Williams v. State*, 48 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 25 A.D.2d 907, 296 N.Y.S.2d 786 (1966), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 843, 276 N.Y.S.2d 885 (1966)(claim predicated on alleged negligence of state employees in failing to prevent the rape of plaintiff's institutionalized mother).

30. *E.g., Zapeda*, 41 Ill. App. 2d at 259, 190 N.E.2d at 858; *Tedeschi*, *supra* note 25, at 514 & nn.2-3, *reprinted in* 7 J. FAM. L. at 466 & nn. 2-3.

31. See note 2 *supra*.

32. Comment, 54 TUL. L. REV. 480, 486 (1980). See *Phillips II*, 508 F. Supp. at 540 n.7; Cohen, Park v. Chessin: *The Continuing Judicial Development of the Theory of "Wrongful Life"*, 4 AM. J.L. & MED. 211, 212 (1979); Comment, 13 WAKE FOREST L. REV. 712, 716 n.27 (1977). But see Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1409 (1977)("emotional trauma resulting from the stigma of bastardy"cases); Comment, 40 MO. L. REV. 167, 177 (1979) ("bastard cases").

33. *Phillips II*, 508 F. Supp. at 541 n.7. A wrongful life claim is brought by a defective child and is based on medical malpractice in failing to advise potential or prospective parents of pertinent fetal risks that may produce severe and irreversible birth defects; by contrast, a dissatisfied life claim is brought by a healthy child and is based more generally on negligence or fraud in failing to avoid plaintiff's illegitimate birth.

34. See *Gleitman*, 49 N.J. at 29, 277 A.2d at 692.

35. See notes 212-218 and accompanying text *infra*. For an analysis of the "wrongful pregnancy" cause of action, see Holt, *Wrongful Pregnancy*, 33 S.C.L. REV. 759 (1982).

pregnancy; the child's corresponding cause of action is often mischaracterized as one for wrongful life.<sup>36</sup> Claims of this type have generally been brought by healthy children, both legitimate<sup>37</sup> and illegitimate,<sup>38</sup> but have also been brought by unplanned children who, coincidentally, were born with congenital defects.<sup>39</sup> Although these claims exhibit some similarities to wrongful life claims, particularly when the child is defective and the motivating factor in the parents' decision to undergo the sterilization procedure was a desire to avoid known genetic risks to possible offspring,<sup>40</sup> the two types of actions are nonetheless distinguishable.

In a true wrongful life claim, the gravamen of the complaint is that the physician's failure accurately to counsel and test the plaintiff's parents concerning certain fetal risks suggested by maternal age and physical condition, family history, or other circumstances precluded a parental decision to spare the plaintiff from the particular affliction by avoiding conception or by aborting the fetus. In comparison, the gravamen of the complaint in the filial claim corresponding to wrongful pregnancy is that the physician's negligence in performing the contraceptive procedure proximately caused the birth of an unplanned child; the consequences of that unplanned birth bear solely on the issue of damages. Because the *sine qua non* of the latter type of claim is the unplanned, as opposed to uninformed, nature of the plaintiff's birth,<sup>41</sup> these claims are more appropriately referred to as "unplanned life" actions. Thus, in a situation involving medical malpractice in performing a contraceptive procedure, the parental cause of action is one for wrongful pregnancy and the filial

36. See, e.g., Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 16 n.3 (1980).

37. E.g., Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977)(healthy child born following failed tubal ligation).

38. E.g., Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976)(healthy but illegitimate child born following unsuccessful abortion).

39. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976)(child born with umbilical hernia following failed tubal ligation); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978)(child born with "serious deformities" following failed vasectomy); Speck v. Finegold, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979)(child born with neurofibromatosis following failed vasectomy and unsuccessful abortion).

40. Compare Speck, 268 Pa. Super. Ct. 342, 408 A.2d 496 with Curlender, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477.

41. For this reason, the claims fall outside the definition of wrongful life claims. See note 2 *supra*.



cause of action is one for unplanned life; in a situation involving medical malpractice in genetic counseling or prenatal testing, the parental cause of action is one for wrongful birth and the filial cause of action is one for wrongful life.

### B. Historical Perspective

The genesis and development of wrongful life claims, as well as birth-related claims in general, have been concomitant with "[t]he growth of medical knowledge regarding birth defects . . . ." <sup>42</sup> More specifically, "[t]he development of . . . sophisticated biochemical and cytogenic tests for assaying amniotic fluid and maternal and fetal blood . . . significantly enhanced the importance of the reproductive counseling aspect of medical genetics." <sup>43</sup> Indeed, the profusion of wrongful life claims since 1975 largely coincides with the refinement of amniocentesis, which allows a physician to remove, culture, and test fetal cells that have been sloughed into the fluid surrounding the fetus in the amniotic sac. <sup>44</sup> In this respect, the crucial step in the clinical development of amniocentesis was its gradual transition during the early 1970s from an experimental procedure to one commonly accepted in medical practice. <sup>45</sup> By the mid-1970s, prenatal diagnosis through amniocentesis and related procedures "during the midtrimester of pregnancy [had] become an accepted practice for the detection and prevention [through abortion] of certain severe congenital abnormalities and hereditary diseases." <sup>46</sup> The

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42. Cohen, *supra* note 32, at 212.

43. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 626 (1979).

44. W. FUHRMANN & F. VOGEL, *supra* note 15, at 91-94; C. STERN, *supra* note 19, at 808-09; Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 97-99 (1974); Shaw, *Genetically Defective Children: Emerging Legal Considerations*, 3 AM. J.L. & MED. 333, 335 (1977); Note, 87 YALE L.J. 1488, 1493 n.21 (1978).

45. Chapman, *What are Your Odds in the Prenatal Gamble*, in LEGAL ASPECTS OF MED. PRAC. 31, 32 (1979). See Nadler & Gerbie, *Present Status of Amniocentesis in Uterine Diagnosis of Genetic Defects*, 38 OBST. & GYN. 789 (1971). "Available legal precedent indicates that most courts would determine that amniocentesis is no longer experimental." Milunsky & Reilly, *The "New" Genetics: Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders*, 1 AM. J.L. & MED. 71, 76 (1975). Compare Johnson, 42 N.Y.2d at 820, 364 N.E.2d at 1341, 396 N.Y.S.2d at 648 (status of amniocentesis in 1969) with Berman, 80 N.J. at 424, 404 A.2d at 10 (status of amniocentesis in mid-1970s).

46. Saul, *et al.*, *Amniocentesis and Prenatal Diagnosis in South Carolina: A Collaborative Report for the Years 1976 to 1979*, 76 J.S.C. MED. A. 387, 387 (1980). "Recent

refinement of amniocentesis, along with other prenatal testing procedures,<sup>47</sup> established the technological predicate for wrongful life and wrongful birth claims.

In 1967, the New Jersey Supreme Court, in *Gleitman v. Cosgrove*<sup>48</sup> became the first appellate court to consider a wrongful life claim. The plaintiff in *Gleitman* had been born with severe birth defects as a result of his mother's exposure to rubella during her pregnancy,<sup>49</sup> and he alleged that the defendant physicians had precluded the opportunity for abortion by erroneously informing his parents that the viral infection would have no effect on him.<sup>50</sup> Rejecting the child's cause of action, the court advanced certain arguments that have appeared frequently in later cases. First, the court held that the plaintiff did not suffer damages "cognizable at law."<sup>51</sup> Drawing heavily on the reasoning developed in earlier dissatisfied life cases,<sup>52</sup> the court pointed to both the practical difficulty in measuring damages<sup>53</sup> and the "logical impossibility" of comparing life with nonexistence.<sup>54</sup>

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studies indicate that amniocentesis is highly accurate in predicting the presence of chromosomal defects, and that the risk of even minor damage to mother or fetus deriving from the procedure is less than one percent." *Berman*, 80 N.J. at 424, 404 A.2d at 10. The safety and accuracy of the procedure, as indicated in *Berman*, are well documented. *E.g.*, Chapman, *supra* note 45, at 34; Feinman, *Getting Along with the Genetic Genie*, in *LEGAL ASPECTS OF MED. PRAC.* 38, 41 (1979); Saul, *et. al.*, *supra*, at 387; National Registry for Amniocentesis Study Group, *Midtrimester Amniocentesis for Prenatal Diagnosis: Safety and Accuracy*, 236 J.A.M.A. 1471 (1976).

47. For a discussion of other prenatal testing procedures, see Goodner, *Prenatal Genetic Diagnosis: Present and Future*, 19 CLIN. OBST. & GYN. 965, 965-76 (1976); Hirshhorn, *Prenatal Diagnosis of Genetic Disease*, in *DEVELOPMENTAL GENETICS* 87, 93 (C. Fenoglio, R. Goodman & D. King eds. 1976); Kass & Shaw, *The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know*, 2 AM. J.L. & MED. 213, 222 (1977); Saul, *et al.*, *supra* note 46, at 388-89; Note, 87 YALE L.J. 1488, 1493 nn.21 & 22 (1978).

48. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

49. For a discussion of the congenital defects associated with the exposure of a fetus to rubella, see S. CHESSE, S. KORN, & P. FERNANDEZ, *PSYCHIATRIC DISORDERS OF CHILDREN WITH CONGENITAL RUBELLA* 16-18, 145-54 (1971); C. STERN, *supra* note 19, at 421.

50. 49 N.J. at 24, 26, 227 A.2d at 691.

51. *Id.* at 29, 227 A.2d at 692.

52. *Id.* (citing *Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849; *Williams*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885; *Tedeschi*, *supra* note 25).

53. 49 N.J. at 28, 227 A.2d at 692.

54. The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of

Second, the court asserted that, even if the damages were cognizable, public policy concerning the sanctity of human life militated against the child's claim. One component of this argument was the statutory proscription of abortion;<sup>55</sup> a second facet was a more generalized expression of the "countervailing public policy supporting the preciousness of human life."<sup>56</sup> The court was reluctant to assume that nonexistence could ever be preferable to life, even severely burdened life, and suggested that if the plaintiff "could have been asked . . . whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all."<sup>57</sup>

One year later, in *Stewart v. Long Island College Hospital*,<sup>58</sup> the New York Supreme Court employed the two rationales advanced in *Gleitman* to dismiss a wrongful life claim involving congenital rubella. The Appellate Division, affirming the dismissal, emphasized the abortion issue and suggested that the difficult questions presented by wrongful life claims should be left to the legislature.<sup>59</sup>

In addition to the gradual acceptance during the early 1970s of prenatal testing procedures such as amniocentesis and related

life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

*Id.* at 29, 227 A.2d at 692.

55. *See id.* at 31, 40-48, 227 A.2d at 693, 699-703 (Francis, J., concurring). *See also* N.J. STAT. ANN. § 2A:87-1 (West 1969)(repealed 1979). Although the court discussed this issue primarily in conjunction with the parent's wrongful birth claim, "[t]he anti-abortion attitude . . . may have pervaded the court's wrongful life thinking as well." Comment, 8 HOFSTRA L. REV. 257, 267 n.85 (1979).

56. 49 N.J. at 31, 227 A.2d at 693. The policy considerations perceived by the dissent differed significantly from those of the majority, suggesting that the denial of the wrongful life claim "permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts." *Id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting).

57. *Id.* at 30, 227 A.2d at 693.

58. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

59. 35 A.D.2d at 532, 313 N.Y.S.2d at 503. Prior to *Park* and *Becker*, see notes 66-70 and accompanying text *infra*, *Stewart* was viewed by the New York courts as dispositive on the issue of wrongful life. *Johnson*, 53 A.D.2d 523, 384 N.Y.S.2d 455; *Karlsons*, 57 A.D.2d 73, 394 N.Y.S.2d 933; *Greenberg*, 47 A.D.2d 765, 367 N.Y.S.2d 966.

tests,<sup>60</sup> the landmark United States Supreme Court decisions in *Roe v. Wade*<sup>61</sup> and *Doe v. Bolton*<sup>62</sup> placed abortion decisions during the first trimester of pregnancy within the constitutional right of privacy derived from the fifth and fourteenth amendments.<sup>63</sup> The first appellate decisions recognizing parental claims for wrongful birth were also rendered during this period.<sup>64</sup> Although the confluence of these developments altered the reasoning of subsequent wrongful life decisions to some extent, the ultimate conclusion that the claims were not cognizable remained the same.<sup>65</sup>

Intermediate appellate opinions in *Park v. Chessin*<sup>66</sup> and *Becker v. Schwartz*,<sup>67</sup> both decided in 1977, represent the first judicial recognition of wrongful life claims. In *Park*, a plaintiff afflicted with infantile polycystic kidney disease<sup>68</sup> sued the defendant obstetricians for negligently misinforming her parents that the birth defect was not hereditary after a previous child

60. See notes 42-47 and accompanying text *supra*.

61. 410 U.S. 113 (1973).

62. 410 U.S. 179 (1973).

63. Although *Roe* and *Doe* were undeniably significant in this respect, it can be argued that eugenic abortions represent a legitimate exercise of the parents' constitutionally protected right of privacy concerning conception, procreation, and other familial decisions and fall within earlier case law concerning such decisions. *Phillips II*, 508 F. Supp. at 550 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

64. *Jacobs*, 519 S.W.2d 846; *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372. See Cohen, *supra* note 32, at 214.

65. For example, in *Dumer*, the Wisconsin Supreme Court recognized the parental claim for wrongful birth in a congenital rubella case while holding that the filial claim for wrongful life did "not state a cause of action against the defendants." 69 Wis. 2d at 773, 233 N.W.2d at 376. De-emphasizing the abortion issue, *id.* at 775 n.6, 223 N.W.2d at 377 n.6, the court relied on *Gleitman* to support the observation that "[t]he major obstacle to the claim of the infant-plaintiff is a determination of damages." *Id.* at 772, 223 N.W.2d at 375. The dichotomous approach exhibited in *Dumer*, recognizing wrongful birth claims while denying wrongful life claims, was echoed in numerous cases in the latter half of the decade. *E.g.*, *Gildiner*, 451 F. Supp. 692.

66. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

67. 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

68. Polycystic kidney disease is a congenital kidney disorder that is "uniformly fatal in infancy." Perkoff, *Renal Diseases* in 1 GENETIC DISORDERS OF MAN 433 (R. Goodman ed. 1970). The infant plaintiff in *Park* died when she was two and one-half years of age. 60 A.D.2d at 81, 400 N.Y.S.2d at 111. For a description of this disease, see STEDMAN'S MEDICAL DICTIONARY 745 (4th unabr. Lawyer's ed. 1976). See V. McKusick, MENDELIAN INHERITANCE IN MAN 267-68 (3d ed. 1971).

was similarly afflicted<sup>69</sup> and asserted that her parents were thereby precluded from making an informed decision to avoid her birth.<sup>70</sup> The trial court had denied the defendants' motion to dismiss the wrongful life claim, observing somewhat obliquely that "[t]he infant defendant does not seek damages for being born, per se, but rather seeks damages for the pain suffered by her *after* her birth based on the tort committed prior to conception."<sup>71</sup> The Appellate Division of the Supreme Court also concluded that the claim was judicially cognizable.<sup>72</sup> The court conceded that the decision was unprecedented,<sup>73</sup> yet offered scant support for it beyond the statement that

cases are not decided in a vacuum; rather decisional law must keep pace with expanding technological, economic and social change. Inherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the right, within certain statutory and case law limitations, not to have a child. This right extends to instances in which it can be determined with reasonable medical certainty that the child would be born deformed. The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being.<sup>74</sup>

The policy considerations advanced in *Gleitman* were noticeably absent from the majority opinion and appeared only in the dissent.<sup>75</sup>

In *Becker v. Schwartz*,<sup>76</sup> a plaintiff afflicted with Down's syndrome<sup>77</sup> alleged that the defendant obstetricians prevented

69. 60 A.D.2d at 83, 400 N.Y.S.2d at 111.

70. *Id.*

71. 88 Misc. 2d 222, 229, 387 N.Y.S.2d 204, 209 (Sup. Ct. 1976) (emphasis in original). On appeal, the trial court's approach to the problem, construing the claim as one for pain and suffering after birth and not "wrongful life," was reiterated in a concurring opinion. 60 A.D.2d at 88, 400 N.Y.S.2d at 115 (Cohalan, J., concurring).

72. 60 A.D.2d at 88, 400 N.Y.S.2d at 114.

73. *Id.* at 87-88, 400 N.Y.S.2d at 114.

74. *Id.* at 88, 400 N.Y.S.2d at 114.

75. *Id.* at 90-91, 400 N.Y.S.2d at 116 (Titone, J., dissenting). The dissent also advanced other policy considerations, including the possibility of adverse effects on intrafamily relationships and the opportunity for fraudulent claims. *Id.* at 92-94, 400 N.Y.S.2d at 117-18.

76. 60 A.D.2d 587, 400 N.Y.S.2d 119.

77. Down's syndrome is also known as mongolism or 21-trisomy. C. STERN, *supra* note 19, at 111, 115. For a description of the abnormalities caused by Down's syndrome, see STEDMAN'S MEDICAL DICTIONARY, *supra* note 68, at 1382. See generally C. BENDA,

an informed parental decision to terminate the pregnancy by negligently failing to inform her parents of the increased incidence of the genetic defect in children born to women over thirty-five years of age<sup>78</sup> or of the availability of amniocentesis and related fetal testing procedures to detect the existence of the condition. A New York trial court dismissed the wrongful life claim for failure to state a cause of action,<sup>79</sup> but the Appellate Division of the Supreme Court, relying primarily on *Park v. Chessin*,<sup>80</sup> reversed and held that the complaint stated a valid cause of action for the child's pain and suffering. As in *Park*, however, the court did not directly address the theoretical difficulties posed by *Gleitman* and subsequent cases.

Although some commentators regarded the intermediate appellate decisions in *Park* and *Becker* as "the first step toward judicial acceptance of the theory of wrongful life,"<sup>81</sup> the two cases, consolidated for appeal, were reversed on that issue by the New York Court of Appeals.<sup>82</sup> The court perceived "two flaws,"<sup>83</sup> corresponding roughly to the two rationales propounded in *Gleitman*, in the plaintiffs' wrongful life claims. First, relying on policy considerations, the court held that the infants did not suffer "any legally cognizable injury. . . . Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."<sup>84</sup> While implicitly recognizing the ef-

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DOWN'S SYNDROME (Rev. ed. 1969); L. PENROSE & G. SMITH, DOWN'S ANOMALY (1966); Kirman, *Down's Syndrome*, in 1 MENTAL RETARDATION 57 (J. Wortis ed. 1970).

78. There is a significant correlation between the incidence of Down's syndrome and maternal age, with the defect occurring approximately once in every two thousand births to mothers under twenty-five years of age and approximately one in every sixty births to women over forty. A. EMERY, ELEMENTS OF MEDICAL GENETICS 61-62 (3d ed. 1974); C. STERN, *supra* note 19, at 112. The risk of bearing children afflicted with Down's syndrome begins to increase sharply with women in their mid-thirties and the point at which the risk becomes significant is taken by most medical authorities to be a maternal age of thirty-five. Galbus, *The Antenatal Detection of Genetic Disorders*, 48 OBST. & GYN. 497, 498 (1976). See Friedman, *supra* note 44, at 100.

79. See *Becker*, 46 N.Y.2d at 406, 386 N.E.2d at 809, 413 N.Y.S.2d at 897.

80. 60 A.D.2d at 588, 400 N.Y.S.2d at 120.

81. Cohen, *supra* note 32, at 232. See, e.g., Note, 2 AM. J. TRIAL ADVOC. 107, 111-13 (1978).

82. *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895.

83. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

84. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

fect of *Roe v. Wade* on prior antiabortion arguments,<sup>85</sup> the court described the policy being applied as “the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.”<sup>86</sup> Second, the court explained that “a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson’s choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make.”<sup>87</sup> The court also expressed concern that liability would expand from severe defects to “less than perfect birth[s]”<sup>88</sup> and that recognition of the claim would preempt a legislative prerogative.<sup>89</sup> In contrast, the court held that the parents’ wrongful birth claims were judicially cognizable because they fell within the traditional tort framework and alleged ascertainable damages.<sup>90</sup>

In *Berman v. Allan*,<sup>91</sup> the New Jersey Supreme Court joined the growing ranks of courts recognizing wrongful birth claims<sup>92</sup> but continued to reject the filial claim for wrongful life.<sup>93</sup> The facts in *Berman* were quite similar to those in *Becker* and focused on the parents’ deprivation of the opportunity for an informed decision to abort the fetus because of the defendant obstetricians’ failure to apprise the plaintiff’s parents of the availability of amniocentesis and the correlation between Down’s syndrome and advanced maternal age.<sup>94</sup> Although the court refused to overrule *Gleitman* with respect to the wrongful life claim, the reasoning of the two cases differed in a number of aspects. The court explicitly abandoned the antiabortion rationale<sup>95</sup> and significantly revised the damages argument. “[W]ere the *measure* of damages our sole concern, it is possible that some judicial remedy could be fashioned which would redress

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85. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

86. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

87. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

88. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

89. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

90. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

91. 80 N.J. 421, 404 A.2d 8 (1979).

92. *Id.* at 430-34, 404 A.2d at 13-15.

93. *Id.* at 426-30, 404 A.2d at 11-13.

94. *Id.* at 424-25, 404 A.2d at 10.

95. *See id.* at 431-32, 404 A.2d at 13-14.

plaintiff, if only in part, for injuries suffered.”<sup>96</sup> Instead, the court premised its decision on the absence of cognizable damages and supported this conclusion with the policy that “life—whether experienced with or without a major physical handicap—is more precious than non-life.”<sup>97</sup> Thus, *Berman* and *Becker* represent a refinement and distillation of the rationales originally proposed in *Gleitman*, with wrongful life damages characterized as uncognizable rather than unascertainable and the abortion issue ostensibly deleted from the policy considerations. To some extent, the damages rationale was subsumed by policy arguments based on the sanctity of human life,<sup>98</sup> since those considerations underlie the conclusion that the damages are not cognizable. The arguments advanced in *Berman* and *Becker* form the basis for subsequent rejections of wrongful life claims.<sup>99</sup>

*Curlender v. Bio-Science Laboratories*,<sup>100</sup> a 1980 decision of the California Court of Appeals, was the first case since *Park* and *Becker* to recognize a wrongful life claim. In *Curlender*, the infant plaintiff sued a physician and two medical laboratories<sup>101</sup> for negligent performance of a genetic screening test for Tay-Sachs disease,<sup>102</sup> which allegedly prevented an informed parental decision to avoid the plaintiff’s conception or “to avail themselves of an amniocentesis or an abortion.”<sup>103</sup> After thoroughly reviewing the decisional law,<sup>104</sup> the court noted both the “gradual retreat from the position of accepting ‘impossibility of measuring damages’ as the sole ground for barring the infant’s right

96. *Id.* at 428, 404 A.2d at 12 (emphasis in original).

97. *Id.* at 429, 404 A.2d at 12. This reasoning was viewed as determinative by the New Jersey Supreme Court in a subsequent wrongful life case. *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981).

98. See *Phillips I*, 508 F. Supp. at 543; Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 650 (1979).

99. *Phillips I*, 508 F. Supp. 537; *Robak*, 503 F. Supp. 982; *Turpin*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128.

100. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

101. *Id.* at 815, 165 Cal. Rptr. at 479.

102. Tay-Sachs disease, also known as infantile amaurotic idiocy, is a genetic disorder found primarily in Ashkenazic Jews. C. STERN, *supra* note 32, at 180. For a description of the characteristics of Tay-Sachs disease, see STEDMAN’S MEDICAL DICTIONARY, *supra* note 68, at 410, 1311.

103. 106 Cal. App. 3d at 817, 165 Cal. Rptr. at 480.

104. *Id.* at 818-26, 165 Cal. Rptr. at 481-86.



of recovery"<sup>105</sup> and "the monumental implications of *Roe v. Wade* . . . ."<sup>106</sup> Acknowledging the significance of policy arguments in previous cases, the court suggested that "considerations of public policy should include regard for social welfare as affected by careful genetic counseling and medical procedures,"<sup>107</sup> particularly in light of "the dramatic increase, in the last few decades, of the medical knowledge and skill needed to avoid genetic disaster."<sup>108</sup>

The reality of the "wrongful-life" concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.<sup>109</sup>

The court held that the plaintiff was entitled to recover damages for pain and suffering during her limited expected life; "any special pecuniary loss resulting from the impaired condition"<sup>110</sup> and punitive damages were also allowed by the court.<sup>111</sup>

While *Curlender* is cogently written and reflects considerable preparation in its attempt to refute systematically the arguments of *Gleitman* and its progeny, the precedential value of the case is equivocal. On September 4, 1980, the California Supreme Court denied defendants' petition for a hearing,<sup>112</sup> perhaps indicating some degree of approval of the intermediate appellate court's opinion.<sup>113</sup> In 1981, however, another California court of

105. *Id.* at 827, 165 Cal. Rptr. at 486.

106. *Id.* at 827, 165 Cal. Rptr. at 487.

107. *Id.* at 827, 165 Cal. Rptr. at 486-87.

108. *Id.* at 827, 165 Cal. Rptr. at 487.

109. *Id.* at 830, 165 Cal. Rptr. at 488.

110. *Id.* at 832, 165 Cal. Rptr. at 489. The court indicated that these special damages would include any costs of care not covered by the parents' wrongful birth claim. *Id.* at 832, 165 Cal. Rptr. at 490.

111. *Id.* at 832-33, 165 Cal. Rptr. at 490.

112. *Curlender v. Bio-Science Laboratories*, No. 2 Civ. 58192 Div. 1 (Cal. Sept. 4, 1980).

113. See *DiGenova v. State Bd. of Educ.*, 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962) (denial of petition does not express approval, but is not "with-

appeals denied a wrongful life claim, asserting that "*Curlender* avoids resolving this fundamental problem of measuring damages, that is, comparing the value of impaired life against no life."<sup>114</sup> The court held: "[a]fter a thorough review of . . . [the] authorities, we reject *Curlender* as unsound under established principles of law and as a sortie into areas of public policy clearly within the competence of the Legislature."<sup>115</sup> Thus, California's position on this issue is presently unclear, and the outcome depends on the ultimate resolution of *Curlender* and *Turpin* by that state's supreme court.<sup>116</sup>

In summary, a historical review of wrongful life claims indicates that they have not been received favorably by the courts; seven of the eight jurisdictions that have considered wrongful life claims do not presently recognize their validity,<sup>117</sup> and one jurisdiction remains unsettled.<sup>118</sup> Dissatisfied life<sup>119</sup> and unplanned life<sup>120</sup> claims have been uniformly unsuccessful. The

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out significance"); *Allstot v. Long Beach*, 104 Cal. App. 2d 441, 446, 231 P.2d 498, 501 (1951)(denial means that lower court was not incorrect). *But see* *People v. Triggs*, 8 Cal. 3d 884, 890, 506 P.2d 232, 236, 106 Cal. Rptr. 408, 412 (1973)(when the appellate court's opinion is in conflict with the law as stated by the Supreme Court, denial "is to be given no weight").

114. *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128, 131 (1981).

115. *Id.* at \_\_\_, 174 Cal. Rptr. at 129.

116. Shortly after the California Supreme Court's denial of defendants' petition for a hearing in *Curlender*, the parties reached an out-of-court settlement of both parental and filial claims reported to be \$1.6 million. *Curlender v. Bio-Science Laboratories, Nos. NW C 67506, NW C 67512* (Cal. Super. Ct. Sept. 11, 1981) (order approving settlement of minor's claim). In *Aragon v. University of Cal. Bd. of Trustees*, No. 289628, a Superior Court judge in Sacramento County California ruled that, based on the precedent of *Curlender*, a wrongful life claim stated a valid cause of action; this ruling eventually led to settlement of both the parental and filial claims during the course of the trial for \$900,000. *N.Y. Times*, Oct. 11, 1981, § Y, at 17, col. 6.

The confusion surrounding these issues under California law may soon be resolved by the California Supreme Court, which has recently granted plaintiff's petition for a hearing in *Turpin*. *Turpin v. Sortini*, No. \_\_\_, Civ. 24319, Div. \_\_\_, (Cal. Aug. 6, 1981).

117. These jurisdictions are Alabama, *Robak*, 503 F. Supp. 982; New Jersey, *e.g.*, *Berman*, 80 N.J. 421, 404 A.2d 8; New York, *e.g.*, *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895; Pennsylvania, *Gildiner*, 451 F. Supp. 692; South Carolina, *Phillips I*, 508 F. Supp. 537; Texas, *Smith v. United States*, 392 F. Supp. 654; and Wisconsin, *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372.

118. *Compare Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 with *Turpin*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128. See notes 100-115 and accompanying text *supra*.

119. *Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849; *Williams*, 46 Misc. 2d 824, 260 N.Y.S.2d 953; *Slawek*, 62 Wis. 2d 295, 215 N.W.2d 9 (counterclaim).

120. *LaPoint*, 409 F. Supp. 118; *Elliott*, 361 So. 2d 546; *Stills*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652; *Clegg*, 89 Misc. 2d 510, 391 N.Y.S.2d 966; *Speck*, 268 Pa. Super. Ct.

overwhelming majority of these decisions deny the claims because of conceptual difficulties in the calculation of damages created by the perceived necessity of comparing impaired life with nonexistence, based on considerations of the sanctity of all human life notwithstanding incidental defects. The few cases recognizing wrongful life claims have focused on the pain and suffering attributable to the defect, without convincingly rebutting the theoretical or philosophical problems attendant to the damages calculation.

### C. *Theoretical Analysis of the Claim*

"[T]he fog produced by the 'wrongful life' label . . . continues to enshroud cases brought on the children's behalf and to prevent analytical clarity."<sup>121</sup> Nevertheless,

[i]rrespective of the label coined, . . . [the] complaints sound essentially in negligence or medical malpractice. As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party.<sup>122</sup>

Thus, it is necessary to examine the theoretical underpinnings of wrongful life claims to determine whether the claims fall within the traditional tort framework.

1. *Duty*.—The view that the common law did not recognize a legal duty to the unborn was first articulated by Justice Holmes in *Dietrich v. Inhabitants of Northampton*.<sup>123</sup> For sixty-two years, most courts denied recovery in tort for prenatal injuries,<sup>124</sup> based "on the assumption that a child *en ventre sa mere* has no juridical existence, and is so intimately united with its mother as to be a part of her and as a consequence is not to be

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342, 408 A.2d 496.

121. Capron, *supra* note 98, at 647.

122. *Becker*, 46 N.Y.2d at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 899.

123. 138 Mass. 14 (1884). Justice Holmes rejected certain analogies to property and criminal law, and relying primarily on the absence of common-law precedent directly on point, held that an unborn child was a part of the mother to which no independent legal duty was owed. *Id.* at 16-17.

124. *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935).

regarded as a separate, distinct, and individual entity."<sup>125</sup> In 1946, however, the United States District Court for the District of Columbia rejected the "*Dietrich* rule" in *Bonbrest v. Kotz*<sup>126</sup> and upheld a claim brought on behalf of a viable infant for prenatal medical malpractice. Noting that "[t]he law is presumed to keep pace with the sciences . . .,"<sup>127</sup> the court concluded that a child, if viable and born alive, could maintain an action for prenatal injuries.<sup>128</sup> The decision in *Bonbrest* prompted "[t]he most spectacular[ly] abrupt reversal of a well settled rule in the whole history of the law of torts,"<sup>129</sup> and by 1972, every jurisdiction that had addressed the issue recognized some legal duty to an unborn child for prenatal injuries.<sup>130</sup>

In the context of wrongful life suits, two difficulties remain. First, although cases of previability negligence by the physician<sup>131</sup> may present a problem in jurisdictions that strictly adhere to the viability requirement of *Bonbrest*, most recent decisions allow recovery for negligence occurring between conception and viability if the child is subsequently born alive.<sup>132</sup> Moreover,

125. *Bonbrest v. Kotz*, 65 F. Supp. 138, 139 (D.D.C. 1946). *Accord*, *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16-17 (1884). *Contra*, *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939)(decision based on state statute); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923)(based on state statute).

126. 65 F. Supp. 138 (D.D.C. 1946).

127. *Id.* at 143.

128. *Id.* at 141-42. The court rejected the argument advanced in *Dietrich* based on the lack of precedent, observed that "[t]he common law is not an arid and sterile thing, . . . static and inert," *id.* at 142, and emphasized the paramount importance of the "right . . . of the individual in his possession and enjoyment of his life, his limbs and his body . . . ." *Id.*

129. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 336 (4th ed. 1971).

130. *E.g.*, *Huskey v. Smith*, 289 Ala. 52, 265 So. 2d 596 (1972); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). *See generally* Annot., 40 A.L.R.3d 1222 (1971). *See also* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. REV. 639 (1980); Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131 (1979).

Under South Carolina law, "a cause of action for wrongful death exists if, at the time of the negligent act, the fetus is viable, regardless of whether it survives to birth." *Phillips I*, 508 F. Supp. at 542 (citing *Fowler v. Woodward*, 244 S.C. 608, 613, 138 S.E.2d 42, 44 (1964)). *See also* *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960).

131. *E.g.*, *Phillips I*, 508 F. Supp. at 542.

132. *E.g.*, *Wolfe v. Isbell*, 291 Ala. 327, 280 So. 2d 758 (1973); *Sana v. Brown*, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962); *Womack v. Buchorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brenna*, 31 N.J. 353, 157 A.2d 497 (1960); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v.*

"the technical aspects of viability could be avoided by construing the physician's duty to advise and to test as a continuing or ongoing duty."<sup>133</sup> Second, in a few wrongful life cases, negligence may precede conception.<sup>134</sup> A number of recent decisions, emphasizing the foreseeability of the harm, have "permit[ted] an infant, born alive, to bring an action for injuries arising out of preconception negligent conduct."<sup>135</sup> These decisions recognize that "public policy no longer prevents a preconception duty from arising, so long as the plaintiff was foreseeably injured by the defendant's conduct."<sup>136</sup> Thus, questions concerning the existence of a legal duty, whether prenatal, previability, or preconception, do not seem to preclude actions for wrongful life.<sup>137</sup>

2. *Breach*.—As with any medical malpractice action, the plaintiff in a wrongful life claim must be able to show that the physician's failure to advise or test the parents concerning the particular fetal risks at issue breached the applicable standard of care.<sup>138</sup> Because "reproductive counseling involves predictive 'diagnosis' based upon risk factors,"<sup>139</sup> physicians are required to provide comprehensive genetic counseling and fetal testing only in those pregnancies in which the appearance of certain risk factors renders the fetal risks foreseeable, and failure to counsel and test breaches the standard of care.<sup>140</sup> The most significant

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Gobeille, 101 R.I. 76, 220 A.2d 222 (1966).

133. *Phillips I*, 508 F. Supp. at 542.

134. *E.g.*, *Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477.

135. *Bergstreser v. Mitchell*, 577 F.2d 22, 25 (8th Cir. 1978). See, e.g., *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973); *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). In *Renslow*, the Illinois Supreme Court stated that "a duty may exist to one foreseeably harmed though he be unknown and remote in time and place." *Id.* at 357, 367 N.E.2d at 1254-55. See *Zepeda*, 41 Ill. App. 2d at 250, 190 N.E.2d at 853; *Park*, 88 Misc. 2d at 230, 387 N.Y.S.2d at 210; *Endresz v. Friedberg*, 24 N.Y.2d 478, 485-86, 248 N.E.2d 901, 905, 301 N.Y.S.2d 65, 70 (1969). But see *Albala v. New York*, 49 U.S.L.W. 2459 (N.Y. Sup. Ct., App. Div. Jan. 8, 1981).

136. Cohen, *supra* note 32, at 221-22.

137. "In fact, considerations of duty are never the substantive reasons for a decision, but only the legal sounding explanation for it." White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 401 (1952).

138. W. PROSSER, *supra* note 129, § 32. The South Carolina Supreme Court has recently abandoned the locality rule in determining the standard of care in medical malpractice cases, "adopt[ing] a standard of care not bound by any geographical restrictions." *King v. Williams*, — S.C. —, 279 S.E.2d 618 (1981).

139. Capron, *supra* note 98, at 626.

140. Cohen, *supra* note 32, at 231; Milunsky & Reilly, *supra* note 45, at 77. "Merely because a child is born defective does not necessarily mean a physician was negligent

indicia of increased fetal risks are advanced maternal age,<sup>141</sup> positive family history of previous affected offspring or affected relatives,<sup>142</sup> and maternal infections during pregnancy.<sup>143</sup> Racial background is important in the case of genetic defects such as Tay-Sachs disease and sickle-cell anemia, and carrier testing may be indicated on that basis.<sup>144</sup> Other pertinent facts include a history of three or more miscarriages<sup>145</sup> and exposure to teratogenic agents.<sup>146</sup>

Some wrongful life cases are not predicated on failure to counsel or test but on inaccurate performance of screening tests<sup>147</sup> or misdiagnosis of afflictions present in previous children.<sup>148</sup> Recovery under these circumstances also depends on the plaintiff's demonstrating that the alleged negligence breached the applicable standard of care.<sup>149</sup> In any case, although recovery may in some instances be precluded by the requirement that the physician's conduct must breach the standard of care imposed by the particular jurisdiction, this requirement does not present a theoretical bar to the recognition of all wrongful life claims.

**3. Proximate Cause.**—The causation issue in a wrongful life claim is whether, "[b]ut for the physician's negligence, the parents would have avoided conception, or aborted the pregnancy,

unless the plaintiff can prove the physician or other defendant did not perform up to the level of standard skill and knowledge commonly possessed by other members of the medical community." Trotzig, *supra* note 36, at 22. Thus, the mere allegation that a physician failed to perform an amniocentesis, without more, is unlikely to show a breach of the standard of care. See *Johnson v. Yeshiva Univ.*, 42 N.Y.2d 818, 819, 364 N.E.2d 1340, 1341, 396 N.Y.S.2d 647, 648 (1977).

141. C. STERN, *supra* note 32, at 422-23; Saul, *et al.*, *supra* note 46, at 388. See note 78 *supra*. One group has suggested that amniocentesis should be performed as standard procedure for pregnancies in which the mother is over the age of thirty-five. National Institute of Child Health and Development, National Registry for Amniocentesis Study Group, *supra* note 46, at 1472-73, 1475-76.

142. Saul, *et al.*, *supra* note 46, at 388-89.

143. The most significant of these is rubella. See note 35 *supra*. Other maternal infections that can produce congenital defects include toxoplasmosis and syphilis. W. HAMILTON & H. MOSSMAN, *supra* note 15, at 206; C. STERN, *supra* note 30, at 421.

144. Feinman, *supra* note 46, at 41; Saul, *et al.*, *supra* note 46, at 389. See note 111 *supra*.

145. Saul, *et al.*, *supra* note 46, at 388, 389.

146. W. HAMILTON & H. MOSSMAN, *supra* note 15, at 206. Examples include certain hormones, such as diethylstilbestrol (DES), chemical agents, such as thalidomide, and physical agents such as x-rays. *Id.*

147. *Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477.

148. *Schroeder*, 87 N.J. 53, 432 A.2d 834.

149. Trotzig, *supra* note 36, at 26-27.

and the child would not have existed.”<sup>150</sup> Assuming that the parents assert that they would have aborted the fetus if they had been properly informed, “[t]he complaint states a sufficient causal relationship between the alleged negligence of the defendants and the failure of . . . [the parents] to obtain an abortion to defeat a motion for judgment on the pleadings based on a lack of proximate cause.”<sup>151</sup>

Some wrongful life decisions misperceive the causation issue by emphasizing that the physician’s negligence did not produce or exacerbate the plaintiff’s injuries.<sup>152</sup> “However, this argument misinterprets the gravamen of the complaint, which is that the physician’s negligence precluded any parental decision to abort the fetus.”<sup>153</sup> Although medical malpractice actions for tortious prenatal injury assert that a physician has injured a child who would otherwise have been born whole, wrongful life actions claim that the physician has caused the birth of an injured child. Assertion in a wrongful life case that the defendant’s negligence did not cause the defect, therefore, merely states a corollary to the definition of the claim.<sup>154</sup>

The distinction between the two causes of action is illustrated by comparing *Gleitman v. Cosgrove*,<sup>155</sup> a wrongful life case involving congenital rubella, with *Scales v. United States*,<sup>156</sup> a prenatal tort case involving the same defect. In *Gleitman*, the plaintiff alleged that the physician’s negligence in failing to inform the parents of the increased risk of congenital defects from the mother’s rubella infection during pregnancy precluded an informed parental decision to abort the fetus and resulted in plaintiff’s birth with congenital rubella.<sup>157</sup> In *Scales*, the plaintiff alleged that the physician’s negligence in administering a rubella vaccination to the mother while she was pregnant produced a maternal rubella infection and resulted in the

150. Comment, 54 TUL. L. REV. 480, 491 (1980).

151. *Gildiner*, 451 F. Supp. at 695. See, e.g., *Phillips I*, 508 F. Supp. at 542-43.

152. E.g., *Smith v. United States*, 392 F. Supp. at 655; *Gleitman*, 49 N.J. at 27-28, 227 A.2d at 691-92.

153. *Phillips I*, 508 F. Supp. at 542. See Cohen, *supra* note 32, at 222; Peters & Peters, *supra* note 11, at 864; Comment, 54 TUL. L. REV. 480, 491 (1980).

154. See note 2 *supra*.

155. 49 N.J. 22, 227 A.2d 689.

156. No. A-79-CA-70 (W.D. Tex. June 9, 1981).

157. 49 N.J. at 26, 227 A.2d at 691.

congenital rubella with which plaintiff was afflicted at birth.<sup>158</sup>

#### 4. Damages.

a. *Difficulty in measuring damages.*—One component of the damages argument advanced in *Gleitman* was the practical difficulty of measuring damages;<sup>159</sup> this facet of the damages argument was, however, explicitly discarded by the New Jersey Supreme Court in *Berman v. Allan*.<sup>160</sup> "If a claim is legally cognizable, mere difficulty in the ascertainment of damages should be insufficient to preclude the action."<sup>161</sup> As one commentator has observed, "[a] refusal to authorize damages on . . . [this] ground appears more a matter of policy than of logic."<sup>162</sup> From a theoretical standpoint, difficulty in measuring damages by itself does not prevent the assertion of wrongful life claims.

b. *"Impossibility" of ascertaining damages.*—The second component of the damages argument advanced in *Gleitman*, and the rationale emphasized by subsequent cases, is the "logical impossibility" of comparing life with nonexistence.<sup>163</sup> As previously noted,<sup>164</sup> however, the "assertion of 'logical impossibility' . . . is less a matter of logic than of philosophy and value preferences;"<sup>165</sup> the damages argument is largely assimilated by the policy considerations on which it is predicated. This argument is

158. No. A-79-CA-70 at 1-2. Since the early 1970s, it has been known that certain "strains of vaccine virus could cross the placenta and infect the fetus, . . . [with] potential risks to the developing fetus . . ." Preblud, *et al.*, *Fetal Risk Associated with Rubella Vaccine*, 246 J.A.M.A. 1413, 1413 (1981). Interestingly, the plaintiff in *Scales* apparently asserted a wrongful life claim among his theories of recovery, alleging that the defendants were negligent in "failing to inform . . . [the mother] of the adverse effects on a fetus when the mother contracts rubella or German measles during the first trimester of pregnancy and . . . [in] failing to advise and offer . . . the option of an abortion." No. A-79-CA-70 at 2. The court did not, however, discuss the wrongful life theory, and the plaintiff's recovery in that case is probably attributable to his prenatal tort claim. *See id.* at 7.

159. 49 N.J. at 28, 277 A.2d at 692.

160. 80 N.J. at 428, 404 A.2d at 12. *See* note 96 and accompanying text *supra*.

161. *Phillips I*, 508 F. Supp. at 542 (citing *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1931)). *See, e.g.*, *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *Harrison & Sons, Inc. v. J.I. Case Co.*, 180 F. Supp. 243 (E.D.S.C. 1960); *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972).

162. Capron, *supra* note 98, at 648.

163. 49 N.J. at 28, 227 A.2d at 692. *Accord*, *Berman*, 80 N.J. at 428-29, 404 A.2d at 12; *Becker*, 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d 900.

164. *See* note 98 and accompanying text *supra*.

165. Capron, *supra* note 98, at 650.



premised on the belief that because "life—whether experienced with or without a major physical handicap—is more precious than non-life,"<sup>166</sup> there can be no damages as a matter of law. Although this "felt intuition"<sup>167</sup> is undoubtedly sincere, it can be disputed both legally and factually.

In a slightly different context, the "right to die" cases<sup>168</sup> demonstrate that the state's interest in the preservation of life can be displaced in some circumstances by an individual's right of privacy.<sup>169</sup> Although these cases focus on an individual's right to decline, as "infringements of bodily integrity,"<sup>170</sup> treatment necessary to prolong life, they nonetheless recognize, at least implicitly, that death may be a preferable and legally cognizable alternative to a severely burdened life. An even closer analogy to the damages calculation in a wrongful life claim is furnished by diethylstilbestrol (DES) litigation.<sup>171</sup>

In contrast to other pharmaceutical product liability cases involving prenatal injuries . . . the damages comparison is rather elusive. . . . [D]amages attributable to [DES] would be measured by comparing the condition of the plaintiff with the drug-induced carcinoma to her presumed condition had her mother not been prescribed the drug—which, ironically, could be nonexistence, since the drug was prescribed to decrease the incidence of spontaneous abortions in high-risk mothers.<sup>172</sup>

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166. *Berman*, 80 N.J. at 429, 404 A.2d at 12. See, e.g., *Phillips I*, 508 F. Supp. at 543; *Gleitman*, 49 N.J. at 30, 227 A.2d at 693; *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. See *Stewart*, 58 Misc. 2d at 436, 296 N.Y.S.2d at 46.

167. *Gleitman*, 49 N.J. at 30, 227 A.2d at 693.

168. E.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied, 429 U.S. 922 (1976). See *Fletcher, Prolonging Life*, 42 WASH. L. REV. 999 (1967); Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632 (1974).

169. *Saikewicz*, 373 Mass. at 739, 370 N.E.2d at 424; *In re Quinlan*, 70 N.J. at 40-41, 355 A.2d at 663-64.

170. *Saikewicz*, 373 Mass. at 739, 370 N.E.2d at 424. See *In re Quinlan*, 70 N.J. at 41, 355 A.2d at 664.

171. *Phillips I*, 508 F. Supp. at 543 n.12. DES has been shown to cause certain fetal disorders when prescribed to pregnant women. See W. HAMILTON & H. MOSSMAN, *supra* note 15, at 206. Consequently, the drug has been the subject of numerous pharmaceutical products liability cases. E.g., *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y. 1979); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1980). For a thorough examination of DES litigation, see Abrahams & Musgrave, *The DES Labyrinth*, 33 S.C.L. REV. 663 (1982).

172. *Phillips I*, 508 F. Supp. at 544 n.12.

Although this analysis "is, admittedly, . . . somewhat artificial and speculative . . .,"<sup>173</sup> it suggests that a damages calculation necessitating the comparison of defective life with nonexistence does not present an insuperable legal obstacle to the prosecution of a tort claim.

The assertion that life is always preferable to nonexistence can also be attacked on a more practical level. In *Berman*, the court noted that "[n]otwithstanding her affliction . . . , [the plaintiff], by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more valuable than the suffering she may endure."<sup>174</sup> In a particular wrongful life suit, this conclusion may indeed be true, but it is not invariably or necessarily true. "Common sense tells us that nonexistence could be preferable to life with certain defects."<sup>175</sup> Some defects are not sufficiently severe to preclude the afflicted individual from deriving any benefit from life; the congenital deafness at issue in *Turpin* is an example of such a defect.<sup>176</sup> Conversely, it is difficult to comprehend how a child afflicted with polycystic kidney disease, which is uniformly fatal in infancy,<sup>177</sup> can possibly derive the benefits described in *Berman*. An extreme example "of the horrendous suffering that can result from a genetic disease . . ."<sup>178</sup> is provided by the Lesch-Nyhan syndrome, a genetically-based enzyme deficiency that generally "leads to death in childhood"<sup>179</sup> and is characterized by severe motor defects and mental retardation:<sup>180</sup> "[a]ffected children mutilate themselves by chewing their lips and fingers and their behavior toward others includes spitting, biting, and hitting."<sup>181</sup> To hold

173. *Id.*

174. *Berman*, 80 N.J. at 430, 404 A.2d at 13.

175. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U.L.Q. 919, 937 (1979). See, e.g., Note, 55 MINN. L. REV. 58, 65-66, 74-75 (1970); Comment, 39 ALB. L. REV. 221, 240 (1975). See also Note, 49 IOWA L. REV. 1005, 1009 (1964).

176. *Turpin*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128. See Comment, 39 ALB. L. REV. 221, 239 (1975).

177. Perkoff, *supra* note 68, at 433. In *Park*, the plaintiff died at two and one-half years of age as a result of polycystic kidney disease. 60 A.D.2d at 81, 400 N.Y.S.2d at 111.

178. Capron, *supra* note 98, at 651 n.151.

179. C. STERN, *supra* note 19, at 724.

180. *Id.*; Nyhan, *Clinical Features of the Lesch-Nyhan Syndrome*, 130 ARCH. INTERN. MED. 186 (1972).

181. C. STERN, *supra* note 19, at 724.

that, as a matter of law, a child afflicted with a severe congenital defect and forced to bear such a burdened existence derives emotional benefits "which are far more valuable than the suffering [he] may endure"<sup>182</sup> is misguided casuistry. Life, when characterized by the benefits mentioned in *Berman*, is surely preferable to nonexistence, but depending on circumstances, life without those benefits—mere existence—may be less desirable than nonexistence,<sup>183</sup> a "state [in which] there is neither happiness nor misery . . ."<sup>184</sup>

Nonetheless, while the damages argument of *Gleitman* and its progeny is insufficient to preclude a wrongful life claim from a theoretical standpoint, it is not altogether unfounded. Insofar as the argument recognizes that both burdens and benefits flow from the physician's negligence, it represents a legitimate and essential insight into wrongful life damages. Calculation of damages in a wrongful life claim does not entail a comparison of life with nonexistence; rather, it requires an assessment of the burdens attributable to plaintiff's birth with congenital defects in

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Aggressive, self-mutilating behavior is probably the most striking aspect of the syndrome. Self-mutilation may begin as early as the eruption of teeth. It usually begins at least shortly thereafter. Most patients bit both their lips and fingers destructively. Every patient we have seen has bitten his lips destructively, unless the primary teeth have been removed very early. In most patients, the hallmark of the syndrome is loss of tissue about the lips. Partial amputations of the fingers are common. . . . In Hyperuricemic children, sensation is intact. They scream in pain while they bite themselves and they are really happy only when securely protected from themselves by physical restraint. Many of these children scream all night until their parents or guardians are taught how to restrain them securely in bed. . . . When protective coverings or restraints are removed their personality changes immediately. They appear terrified. As they get older, they learn to call for help. Often while they are screaming or calling they are already tearing at their flesh.

Nyhan, *supra* note 180, at 187-88.

182. *Berman*, 80 N.J. at 430, 404 A.2d at 13.

183. The argument that life is always preferable to nonexistence had its genesis in dissatisfied life cases, *see* note 52 and accompanying text *supra*. The argument is considerably more compelling, however, with respect to healthy children whose sole injury is their illegitimate status, *see* Comment, 39 ALB. L. REV. 221, 239 (1975), and, at least in the context of wrongful life claims, the argument is not sufficiently persuasive to justify the preclusion of damages as a matter of law. This conclusion is supported by the judicial treatment of the same argument in wrongful birth cases, in which the argument has been transformed from a rule of law barring wrongful birth claims to an element of the damages calculation—the so-called "benefits rule." *See* notes 292-302 and accompanying text *infra*. *See* Holt, *supra* note 35, at 780.

184. Tedeschi, *supra* note 25, at 530, *reprinted in* 7 J. FAM. L. at 484.

relation to the benefits that plaintiff can derive from life despite the defects. Recognition that "[i]f the burdens outweigh the benefits, then the plaintiff has been harmed by being born"<sup>185</sup> avoids the necessity of constructing mathematical models to circumvent supposed philosophical dilemmas in the calculation of wrongful life damages<sup>186</sup> and relies instead upon the well-established principle that "[w]hen the defendant's tortious conduct has caused harm to the plaintiff . . . and . . . has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit that was conferred is considered in mitigation of damages, to the extent that this is equitable."<sup>187</sup>

5. *Policy Considerations.*—The preceding analysis demonstrates that wrongful life claims evince the requisite elements of a negligence action and therefore conform to the traditional tort framework. This conclusion has also been reached by some courts,<sup>188</sup> which candidly concede that "[t]he most potent arguments . . . against 'wrongful life' claims are predicated on public policy considerations."<sup>189</sup> While some of these policy considerations have been indirectly addressed in the context of damages,<sup>190</sup> their crucial role in judicial rejections of wrongful life claims necessitates additional scrutiny. A brief review of wrongful birth claims, however, with particular attention to the evolution of policy considerations in those claims, provides a better perspective for the examination of these decisive arguments.<sup>191</sup>

### III. WRONGFUL BIRTH

#### A. *Background*

Under circumstances in which a congenitally defective child has an action for wrongful life, the parents have a corresponding claim for "wrongful birth."<sup>192</sup> Although the cases vary widely in their treatment of damages,<sup>193</sup> a wrongful birth claim typically

185. Cohen, *supra* note 32, at 227.

186. See, e.g., Note 55, MINN. L. REV. 58, 66 (1970).

187. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

188. *Curlender*, 106 Cal. App. 3d at 829-30, 165 Cal. Rptr. at 488-89. See *Phillips I*, 508 F. Supp. at 542-43.

189. 508 F. Supp. at 543.

190. See notes 163-184 and accompanying text *supra*.

191. See notes 302-321 and accompanying text *infra*.

192. See note 3 *supra*.

193. See generally Note, *Wrongful Birth Damages: Mandate and Mishandling by*

seeks recovery for the expense of caring for the child<sup>194</sup> as well as compensation for the emotional distress of the parents.<sup>195</sup>

Confusion engendered by overlapping terminology, which has previously been discussed in the context of filial birth-related claims,<sup>196</sup> is also present in the area of parental claims. "Wrongful birth" has been used to describe both the parental claim for medical malpractice in genetic counseling or prenatal testing and the parental claim for medical malpractice or other professional negligence in contraception.<sup>197</sup> Because of important distinctions between these causes of action, however, particularly in the area of damages,<sup>198</sup> the terms "wrongful birth" and "wrongful pregnancy" are now generally used to differentiate the claims.<sup>199</sup> An action for wrongful pregnancy is commonly brought by the parents of an unplanned child who allege that a physician has negligently performed a contraceptive procedure<sup>200</sup> or that a pharmaceutical manufacturer or a pharmacist has negligently prepared or dispensed a contraceptive prescription.<sup>201</sup> Thus, "wrongful pregnancy" actions typically involve a *healthy*, but *unwanted*, child. "Wrongful birth" actions, on the other hand, usually involve *planned* children who are born *de-*

*Judicial Fiat*, 13 VAL. U.L. REV. 127 (1978).

194. Some courts have allowed recovery for all expenses incident to raising the child, while others have limited recovery to extraordinary expenses. Compare *Robak*, 658 F.2d at 479, with *Becker*, 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902-03.

195. *E.g.*, *Berman*, 80 N.J. at 426, 404 A.2d at 14. In *Berman* the "emotional distress" suffered by the parents was viewed as the sole element of their recovery, *id.*, but this view was subsequently modified to allow certain medical expenses incurred for the child in addition to the emotional trauma experienced by the parents. *Schroeder*, 87 N.J. 53, 432 A.2d 234.

196. See notes 14-41 and accompanying text *supra*.

197. See, *e.g.*, *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Annot., 83 A.L.R.3d 15 (1978); Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131 (1979).

198. See note 203 *infra*.

199. *E.g.*, *Phillips II*, 508 F. Supp. at 545 n.1; Comment, 54 TUL. L. REV. 480, 483 (1980).

200. *E.g.*, *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976)(unsuccessful abortion); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977)(unsuccessful vasectomy); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975)(unsuccessful tubal ligation). Wrongful pregnancy claims have also been predicated on the failure to diagnose pregnancy in sufficient time to allow an abortion. *E.g.*, *Ziemba v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974). See note 35 *supra*.

201. *E.g.*, *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971). See note 35 *supra*.

formed.' ”<sup>202</sup> The use of terminology distinguishing these claims is important in analyzing the theoretical issues raised by the claims, but “[p]erhaps the most compelling justification for this terminology is provided by those jurisdictions that recognize ‘wrongful birth’ claims, but not ‘wrongful pregnancy’ claims.”<sup>203</sup> As defined in this article, sixteen reported cases<sup>204</sup> in eight jurisdictions can properly be described as wrongful birth claims. Wrongful pregnancy claims constitute a more extensive body of case law.<sup>205</sup>

### B. Historical Perspective

Because wrongful birth and wrongful life claims are usually brought together, either in the same case<sup>206</sup> or as companion cases,<sup>207</sup> a historical examination of wrongful birth cases largely

202. *Phillips II*, 508 F. Supp. at 545 n.1 (emphasis in original)(quoting Comment, 54 Tul. L. Rev. 480, 485 (1980)). Some wrongful pregnancy claims involve unplanned children who, coincidentally, are born with congenital defects, e.g., *LaPoint v. Shirley*, 409 F. Supp. 118 (W.D. Tex. 1976), thus minimizing the distinction in damages between wrongful pregnancy claims and wrongful birth claims.

203. *Phillips II*, 508 F. Supp. at 545 n.1. Two jurisdictions utilize this approach, recognizing wrongful birth claims while denying wrongful pregnancy claims based on the absence of damages under the so-called “benefits rule.” Compare *Jacobs*, 519 S.W.2d 846 and *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372 (wrongful birth cases) with *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert denied*, 415 U.S. 927 (1974) and *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974)(wrongful pregnancy cases). For further discussion of the benefits rule, see notes 211, 220 & 292-301 and accompanying text *infra*. See *Holt*, *supra* note 35, at 780-83.

204. *Robak*, 658 F.2d 471; *Phillips II*, 508 F. Supp. 544; *Gildiner*, 451 F. Supp. 692; *Turpin*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128; *Schroeder*, 87 N.J. 53, 432 A.2d 834; *Berman*, 80 N.J. 421, 404 A.2d 8; *Gleitman*, 49 N.J. 22, 227 A.2d 689; *Becker*, 60 A.D.2d 587, 400 N.Y.S.2d 119; *Park*, 60 A.D.2d 80, 400 N.Y.S.2d 110; *Karlsons*, 57 A.D.2d 73, 394 N.Y.S.2d 933; *Johnson*, 53 A.D.2d 523, 384 N.Y.S.2d 455; *Greenberg*, 47 A.D.2d 765, 367 N.Y.S.2d 966; *Howard v. Lecher*, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1972), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); *Stewart*, 58 Misc. 2d 432, 296 N.Y.S.2d 41; *Jacobs*, 519 S.W.2d 846; *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372. See *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978)(action barred by statute of limitations).

205. E.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); *Public Health Trust v. Brown*, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975); *Ziemba v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974). See generally Annot., *supra* note 197.

206. E.g., *Gleitman*, 49 N.J. 22, 227 A.2d 689.

207. E.g., *Phillips II*, 508 F. Supp. 544 (wrongful birth claim); *Phillips I*, 508 F. Supp. 537 (wrongful life claim).

entails a reprise of the previous examination of wrongful life claims. Although these examinations focus on many of the same cases, they nevertheless reveal a marked divergence in the judicial treatment of the two causes of action.

In *Gleitman v. Cosgrove*,<sup>208</sup> the New Jersey Supreme Court, confronted with an issue of first impression, rejected the parents' wrongful birth claim on basically the same grounds advanced for the denial of the wrongful life claim.<sup>209</sup> First, the court pointed to the difficulty of measuring damages: "a court would have to evaluate the . . . intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is . . . impossible to perform . . ."<sup>210</sup> As with the court's treatment of wrongful life, however, the "damages argument was, in reality, a thinly-disguised policy argument, borrowed from earlier 'wrongful pregnancy' cases, . . . which presupposed that the birth of a child was a 'blessed event,' the benefits of which would as a matter of law outweigh its burdens."<sup>211</sup> Second, the court explicitly relied on certain public policy considerations<sup>212</sup> with two distinct components. Although the court expressly invoked a perceived public policy against abortion,<sup>213</sup> it also couched the policy argument in broader terms:

The sanctity of the single human life is the decisive factor in this suit in tort. . . . We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.<sup>214</sup>

As with the denial of the wrongful life claim, the court's decision was premised on an underlying assumption: "[i]t is basic to the

208. 49 N.J. 22, 227 A.2d 689.

209. See notes 48-57 and accompanying text *supra*.

210. 49 N.J. at 29, 227 A.2d at 693.

211. *Phillips II*, 508 F. Supp. at 549 (citing *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934)); *Shaheen v. Knight*, 6 Lycoming Rep. 19, 11 Pa. D.&C.2d 41 (1957)).

212. 49 N.J. at 30-31, 227 A.2d at 693.

213. *Id.* at 30, 227 A.2d at 693. See note 55 *supra*. But see note 63 *supra*.

214. 49 N.J. at 30-31, 227 A.2d at 693 (citation omitted).

human condition to seek life and hold on to it however heavily burdened."<sup>215</sup> The two rationales advanced in *Gleitman* were substantially adopted by the next jurisdiction to consider a wrongful birth claim. In *Stewart v. Long Island College Hospital*,<sup>216</sup> a New York court emphasized the antiabortion issue in denying a wrongful birth claim.<sup>217</sup>

During the early 1970s legal developments concerning abortion<sup>218</sup> and scientific advancements in prenatal testing<sup>219</sup> significantly affected judicial perception of wrongful birth claims. The assertion during this period of the first wrongful pregnancy claims was another important consideration in the development of the legal groundwork for wrongful birth claims. Early wrongful pregnancy actions had been uniformly unsuccessful because of the presumption that, as a matter of law, the benefits conferred by birth were greater than the burdens.<sup>220</sup> Beginning with *Custodio v. Bauer*<sup>221</sup> in 1967, however, the benefits rule was gradually transformed from an absolute bar to recovery in wrongful pregnancy cases to a flexible principle governing mitigation of damages.<sup>222</sup> Thus, the "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood,"<sup>223</sup> which the court in *Gleitman* had found impossible to ascertain in a wrongful birth claim,<sup>224</sup> were found to be calculable in the first successful wrongful pregnancy cases.<sup>225</sup>

In 1975, as a result of these developments, two state su-

215. *Id.* at 30, 227 A.2d at 693.

216. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 293 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

217. 58 Misc. 2d at 436-37, 296 N.Y.S.2d at 45-46.

218. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). See notes 61-63 and accompanying text *supra*.

219. See notes 42-47 and accompanying text *supra*.

220. The benefits rule was first articulated in *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934). See note 211 and accompanying text *supra* and note 203 *supra*.

221. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

222. See, *e.g.*, *Troppi*, 31 Mich. App. at 255, 187 N.W.2d at 518-19.

223. *Gleitman*, 49 N.J. at 29, 227 A.2d at 693.

224. *Id.*

225. *Troppi*, 31 Mich. App. 240, 187 N.W.2d 511. *Troppi* and other successful wrongful pregnancy cases also significantly affected the judicial perception of public policy considerations in birth-related claims. See note 298 and accompanying text *infra*.



preme courts recognized wrongful birth claims.<sup>226</sup> In *Jacobs v. Theimer*,<sup>227</sup> the Supreme Court of Texas allowed the parents to recover for "[t]he economic burden related solely to the physical defects of the child . . .,"<sup>228</sup> which had allegedly resulted from the physician's misdiagnosis of a rubella infection in the mother.<sup>229</sup> The court held that the physician was under a duty to warn of the risk in continuing the pregnancy.<sup>230</sup> Noting that the lower court had granted a summary judgment for the physician based on "the prohibition against abortion in this state's penal code in 1968,"<sup>231</sup> the court recognized the importance of *Roe v. Wade*<sup>232</sup> and minimized the significance of policy considerations:

We do not regard the issue before us as requiring our decision of the public policy either for or against abortion. This is a matter of very different but very deep feeling. So long as no violation of criminal statutes is proposed, the courts should regard the question as one to be resolved by the wife and her husband. At least, the courts should not penalize them for the choice which these plaintiffs say that they would have made.<sup>233</sup>

Although the court disapproved of wrongful life claims,<sup>234</sup> it held unequivocally that wrongful birth claims were not barred by public policy.<sup>235</sup> In *Dumer v. St. Michael's Hospital*,<sup>236</sup> the Wisconsin Supreme Court, relying primarily on *Jacobs*,<sup>237</sup> recognized a cause of action for wrongful birth.<sup>238</sup> Holding that the physician had a duty to inform the mother of the probable effects of rubella on the fetus,<sup>239</sup> the court concluded that, if the parents could carry the burden of proof at trial, they were "enti-

226. *Jacobs*, 519 S.W.2d 846; *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372.

227. 519 S.W.2d at 847, 850.

228. *Id.* at 849. The court specifically disallowed child-rearing expenses beyond the special medical expenses related to the defect, as well as damages for the parents' mental anguish. *Id.*

229. *Id.* at 847.

230. *Id.* at 848.

231. *Id.* at 847. See *Jacobs*, 507 S.W.2d 288.

232. 519 S.W.2d at 847-48.

233. *Id.* at 848.

234. *Id.* (dictum following discussion of *Gleitman*).

235. *Id.* at 850.

236. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

237. *Id.* at 776 n.7, 233 N.W.2d at 377 n.7.

238. *Id.* at 776, 233 N.W.2d at 377.

239. *Id.* at 775, 233 N.W.2d at 377.

tled to the damages . . . sustained because of the deformity and defects of the child."<sup>240</sup>

In *Gildiner v. Thomas Jefferson University Hospital*,<sup>241</sup> the United States District Court for the Eastern District of Pennsylvania recognized a wrongful birth claim in a Tay-Sachs disease case, finding that the plaintiffs had shown the requisite elements of a cause of action predicated on negligence.<sup>242</sup> The court declined to follow *Gleitman* and emphasized that *Roe* guaranteed the "[p]arents . . . a constitutionally-protected right to obtain an abortion during the first trimester of pregnancy, free of state interference."<sup>243</sup> Indeed, the policy considerations advanced in *Gildiner* were vastly different from those in *Gleitman*:

Society has an interest in insuring that genetic testing is properly performed and interpreted. The failure to properly perform or interpret an amniocentesis could cause either the abortion of a healthy fetus, or the unwanted birth of a child afflicted with Tay-Sachs disease. Either of these occurrences is contrary to the public policy of Pennsylvania. The recognition of a cause of action for negligence in the performance of genetic testing would encourage the accurate performance of such testing by penalizing physicians who fail to observe customary standards of good medical practice.<sup>244</sup>

The court authorized the recovery of damages for the child's medical expenses, but reserved ruling on other possible elements of damages.<sup>245</sup>

The dichotomous approach of *Jacobs*, *Dumer*, and *Gildiner*, recognizing wrongful birth claims while rejecting wrongful life claims, set the pattern for subsequent cases. Although the decisional law in New York was limited to some extent by the precedent of *Stewart*,<sup>246</sup> the court of appeals implicitly overruled that

240. *Id.* at 776, 233 N.W.2d at 377.

241. 451 F. Supp. 692 (E.D. Pa. 1978).

242. *Id.* at 695-96.

243. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

244. *Id.* at 696.

245. *Id.*

246. See notes 216 & 217 and accompanying text *supra*. Some New York cases, following *Stewart*, clearly rejected wrongful birth claims on grounds similar to *Gleitman*. *E.g.*, *Greenberg*, 47 A.D.2d 765, 367 N.Y.S.2d 966. Other cases rejected wrongful birth claims on other grounds, specifically the absence of a duty to the parents and the speculativeness of emotional damages. *E.g.*, *Howard v. Lecher*, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

opinion in *Becker v. Schwartz*,<sup>247</sup> which held that the parental claims in the two consolidated cases<sup>248</sup> stated valid causes of action.<sup>249</sup> Relying on *Jacobs* and *Dumer*, the court found that the parental claims contained the necessary elements for a negligence action<sup>250</sup> and suggested, without specifying the items to be used in computation, that the parents' damages would include their pecuniary loss<sup>251</sup> but did not include damages for emotional harm.<sup>252</sup>

In *Berman v. Allan*,<sup>253</sup> the New Jersey Supreme Court reaffirmed *Gleitman's* rejection of wrongful life claims<sup>254</sup> but abandoned the rationale of the earlier case concerning wrongful birth. *Berman* expressed strong disapproval of the damages argument advanced in *Gleitman*: "to deny . . . [the plaintiffs] redress for their injuries merely because damages cannot be measured with precise exactitude would constitute a perversion of fundamental principles of justice."<sup>255</sup> Recognizing the impact of *Roe*,<sup>256</sup> the court held that public policy considerations concerning abortion could

no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. . . . Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort a fetus

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247. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). Arguably, two earlier cases had implicitly overruled *Stewart*, but, as with *Becker*, neither of them expressly addressed *Stewart* or its rationale. In *Karlsons*, 57 A.D.2d 73, 394 N.Y.S.2d 933, the court apparently recognized the cause of action, disagreeing with the appellate division's rejection of emotional damages in *Howard v. Lecher*; this decision, however, preceded the court of appeals' affirmance of *Howard*. In *Johnson*, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976), the court also apparently recognized the validity of wrongful birth claims, but rejected the particular claim in that case for failure to show a breach of the applicable standard of care.

248. *Becker*, 60 A.D.2d 587, 400 N.Y.S.2d 119; *Park*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977). See note 82 and accompanying text *supra*.

249. 46 N.Y.2d at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

250. *Id.* at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

251. *Id.* at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

252. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901 (citing *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977)). See note 246 *supra*.

253. 80 N.J. 421, 404 A.2d 8 (1979).

254. See notes 91-98 and accompanying text *supra*.

255. 80 N.J. at 433, 404 A.2d at 15 (citing *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931)).

256. 80 N.J. at 431, 404 A.2d at 13.

which, if born, would suffer from genetic defects.<sup>257</sup>

While following the emerging trend in allowing the parents' claim, *Berman* adopted an unusual posture with respect to damages; the court permitted damages for mental anguish<sup>258</sup> but, based on a peculiar application of the benefits rule, rejected all expenses incident to the child's care:<sup>259</sup>

In essence, . . . [the plaintiffs] desire to retain all the benefits inhering in the birth of the child—i.e., the love and joy they will experience as parents—while saddling the defendants with the enormous expense attendant upon her hearing. . . . [W]e find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.<sup>260</sup>

The unique position of *Berman* on the issue of damages has recently been modified by the New Jersey Supreme Court in *Schroeder v. Perkel*,<sup>261</sup> which awarded the parents "certain medical expenses"<sup>262</sup> related to the child's affliction.

Three other jurisdictions have adopted similar approaches to wrongful birth claims. In *Phillips v. United States*,<sup>263</sup> the United States District Court for the District of South Carolina, upholding a wrongful birth claim, observed that the "claim falls within the traditional boundaries of negligence . . . ."<sup>264</sup> In

257. *Id.* at 431-32, 404 A.2d at 14.

258. *Id.* at 433-34, 404 A.2d at 14-15.

259. *Id.* at 432, 404 A.2d at 14.

260. *Id.* Ironically, *Becker* has used the benefits rule in refusing to recognize *emotional* damage as "too speculative." 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902 (despite the child's affliction, the "parents may yet experience a love that even an abnormality cannot fully dampen"). The *Becker* court also observed, however, that this argument was "dependent upon the extent of the affliction," *id.*, which militates against its use to bar, as a matter of law, either mental anguish or medical expenses in all wrongful birth claims without reference to the particular factual circumstances.

261. 87 N.J. 53, 432 A.2d 834 (1981).

262. *Id.* at —, 432 A.2d at 841-42.

263. *Phillips II*, 508 F. Supp. 544 (D.S.C. 1981).

264. *Id.* at 550. The validity of the wrongful birth claim in *Phillips* has been challenged by a motion for summary judgment, and the court did not address the scope of damages, noting only that "some type of damages would be appropriate . . . ." *Id.* at 551. Recently, the court addressed the issue of liability in *Phillips* and held that the failure of the staff at the [Naval Regional Medical Center] to provide adequate genetic counseling and prenatal testing in light of Mrs. Phillips' positive family history of Down's syndrome constituted a breach of the applicable stan-

*Robak v. United States*,<sup>265</sup> the Seventh Circuit, emphasizing the impact of *Roe*, became the first federal appellate court to recognize a cause of action for wrongful birth.<sup>266</sup> Although the Seventh Circuit's rationale was not unusual, the scope of damages permitted by the court was unprecedented; the court not only allowed the extraordinary expenses attributable to the child's congenital rubella<sup>267</sup> but also reversed the district court's<sup>268</sup> ruling allowing deduction of "the costs of raising a normal child."<sup>269</sup> Finally, California apparently recognizes wrongful birth claims,<sup>270</sup> although the parameters of the damages calculation in that jurisdiction are unclear.

In summary, a historical review of wrongful birth claims reveals that "the jurisdictions that have reached the merits of the controversy are currently unanimous in their recognition of the cause of action. . . . 'Although the courts have not been in agreement on how to assess damages, the majority now allow recovery of some sort to the parents.'"<sup>271</sup>

dard of obstetrical care, precluding an informed prenatal decision to avoid the birth of a severely afflicted child . . . .

*Phillips v. United States*, Nos. 79-551-8, 79-553-8, at 16 (D.S.C. Dec. 7, 1981). Because of the bifurcated nature of the trial, the issue of damages has not yet been resolved. *See id.* at 27-28.

265. 658 F.2d 471 (7th Cir. 1981)(applying Alabama law).

266. *Id.* at 474-77. "*Gleitman* and *Stewart* were based on public policy concerns that have changed dramatically since the constitutional right to an abortion was recognized in *Roe*." *Id.* at 475 n.7. The court also refused to be bound by *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978), a case involving wrongful pregnancy and unplanned life claims, because of its reliance on *Gleitman* without recognition of the effect of *Roe*. *Id.* at 474. 267. *Id.* at 478.

These costs included past expenses of nearly \$30,000; the cost of residential education and care to age 21, discounted to present value (\$229,800); the cost of a qualified companion, skilled in sign language and experienced in dealing with emotionally disturbed persons, for the remainder of Jennifer's adult life, or comparable institutional care (\$515,000); and the cost of maintaining her for her adult life, since she will never be self-supporting (\$200,000).

*Id.* at 478.

268. *Robak*, 503 F. Supp. 982.

269. 658 F.2d at 478-79. The court relied on a number of wrongful pregnancy cases for this element of damages. *Id.* at 479 n.24. No mention was made of the benefits rule.

270. *See Curlender*, 106 Cal. App. 3d at 817 n.7., 165 Cal. Rptr. at 481 n.7 (1980)(noting pendency of wrongful birth claim). In *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981), the intermediate appellate court noted that a parental cause of action for wrongful birth "is authorized by *Stills v. Gratton* . . . and is not challenged on this appeal." *Id.* at n.2, 174 Cal. Rptr. at 129 n.2 (citing *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976)).

271. *Phillips II*, 508 F. Supp. at 549. These jurisdictions are Alabama, *Robak*, 658

### C. Theoretical Analysis of the Claim

The unanimity of the jurisdictions that have considered wrongful birth cases demonstrates that the claim satisfies the traditional requirements for a negligence action: duty, breach, proximate cause, and damages. For the sake of completeness, these elements will be discussed briefly.

1. *Duty*.—The physician's duty to the parents, particularly the mother, is not subject to the difficulties presented by the filial claim;<sup>272</sup> in wrongful birth claims, the physician's professional relationship with the mother clearly establishes a duty of due care.<sup>273</sup> Although some courts have had problems distinguishing between the duties owed to the parents and those owed to the child,<sup>274</sup> it is clear that the parents' claims are not derived from the claim of the child.<sup>275</sup> The decisions unequivocally recognize the duty flowing from the physician to his patient.<sup>276</sup> Furthermore, in *Schroeder v. Perkel*,<sup>277</sup> an intermediate appellate court held that the physician owed a duty to the parents even though his patient was actually their first child, whose genetically-based disease the physician failed to diagnose before the parents' conception of a second child.<sup>278</sup> Unquestionably, wrongful birth claims contain the necessary element of duty between the physician and the parents.

2. *Breach*.—As with wrongful life claims,<sup>279</sup> the duty to inform parents of the risk of fetal defects depends on the foreseeability of those risks. Foreseeability depends on the appearance of certain risk factors.<sup>280</sup> Whether a physician's failure to inform

F.2d 471; California, *Turpin*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128; New Jersey, *e.g.*, *Berman*, 80 N.J. 421, 404 A.2d 8; New York, *e.g.*, *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895; Pennsylvania, *Gildiner*, 451 F.Supp. 692; South Carolina, *Phillips II*, 508 F. Supp. 544; Texas, *Jacobs*, 519 S.W.2d 846; and Wisconsin, *Dumer*, 69 Wis. 2d 766, 233 N.W.2d 372.

272. See notes 123-137 and accompanying text *supra*.

273. See, *e.g.*, W. PROSSER, *supra* note 129, § 32.

274. See, *e.g.*, *Howard*, 53 A.D.2d 420, 386 N.Y.S.2d 460.

275. *Gildiner*, 451 F. Supp. at 695.

276. *E.g.*, *Becker*, 46 N.Y.2d at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901; *Jacobs*, 519 S.W.2d at 848; *Dumer*, 69 Wis. 2d at 776, 233 N.W.2d at 377.

277. 87 N.J. 53, 432 A.2d 834 (1981).

278. *Id.* at —, 432 A.2d at 838-39. "A physician's duty . . . may extend beyond the interests of a patient to members of the immediate family of the patient who may be adversely affected by a breach of that duty." *Id.*

279. See notes 138-159 and accompanying text *supra*.

280. See notes 139-146 and accompanying text *supra*.

parents of risks breached his duty of care must be determined by expert testimony.<sup>281</sup> Although the proof of the physician's breach is an issue of fact, questions concerning the existence of breach do not present a legal or theoretical bar to the recognition of wrongful birth claims.

3. *Proximate Cause.*—Assuming that the parents allege and show that, but for the physician's negligence, they would have terminated the pregnancy or avoided conception, the element of proximate cause does not present a legal obstacle to wrongful birth claims.<sup>282</sup> Although earlier cases apparently required the parents to show that an abortion was legally obtainable at the time that it could have been performed,<sup>283</sup> more recent cases hold that this argument is specious if an abortion could have been obtained in another state.<sup>284</sup> Attempts by defendants in wrongful pregnancy cases to construe the parent's act of sexual intercourse as an intervening cause that supersedes the physician's negligence<sup>285</sup> may be applicable to wrongful birth claims based on preconception negligence, but the defense has not been successful in the wrongful pregnancy context<sup>286</sup> and is no more persuasive in the wrongful birth context. Thus, the parents' assertion that they would have avoided the defective child's birth if they had been properly informed is sufficient to establish the "causal connection between defendant's failure to inform and plaintiffs' damages."<sup>287</sup>

4. *Damages.*—As indicated by the historical review of wrongful birth claims, "the question of damages has presented a

281. *Phillips II*, 508 F. Supp. at 551. See *Phillips v. United States*, Nos. 79-551-8, 79-553-8, at 8-16 (D.S.C. Dec. 7, 1981)(liability order).

282. *E.g.*, *Robak*, 658 F.2d at 477; *Gildiner*, 451 F. Supp. at 695; *Jacobs*, 519 S.W.2d at 848. See notes 150 & 151 and accompanying text *supra*.

283. *Jacobs*, 519 S.W.2d at 848. See *Dumer*, 69 Wis. 2d at 775 n.6, 233 N.W.2d at 377 n.6.

284. *Robak*, 658 F.2d at 476-77. Moreover, if a state's abortion statute has been declared unconstitutional after the tort has been committed but before the action has been commenced, a court may refuse to give the unconstitutional law continuing effect. *Id.* at 475. See *Phillips II*, 508 F. Supp. at 550 (suggesting that constitutional protection of eugenic abortions preceded *Roe*).

285. See *Bishop v. Byrne*, 205 F. Supp. 460 (S.D.W. Va. 1967); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

286. 265 F. Supp. at 464; 251 Cal. App. 2d at 316, 59 Cal. Rptr. at 472.

287. *Jacobs*, 519 S.W.2d at 848. Presumably, an admission by the plaintiffs, either in discovery or at trial, that they would not have obtained an abortion under any circumstance would bar a wrongful birth claim based on postconception negligence.

difficult and troublesome problem to the courts that have considered 'wrongful birth' claims, with that difficulty engendering widely divergent approaches . . . ."<sup>288</sup> Courts generally allow the extraordinary expenses relating to the child's defect that must be borne by the parents,<sup>289</sup> and some courts have compensated for the parents' pain and suffering or mental anguish.<sup>290</sup> One court has allowed all expenses incident to the care of the child, without discounting those expenses not directly related to the child's defect that would be necessary for a normal child.<sup>291</sup>

Much of the confusion apparent in the area of damages has been created by the benefits rule. Admittedly, the physician's negligence may result in both benefits and detriments to the parents;<sup>292</sup> despite the affliction of the child, the "parents may yet experience a love that even an abnormality cannot fully dampen."<sup>293</sup> This argument has been used to deny, as a matter of law, recovery for both pecuniary loss<sup>294</sup> and emotional anguish.<sup>295</sup> The principle underlying the benefits rule<sup>296</sup> should not, however, operate as a complete bar to any element of the parents' damages. Although the benefits rule was originally propounded as a theoretical barrier to the recognition of wrongful pregnancy claims involving healthy children<sup>297</sup> its application even in that context has gradually been restricted: it would be "myopic to declare today that the benefits [of parenthood] exceed the costs as a matter of law."<sup>298</sup> Moreover, the benefits derived by the parent in a wrongful birth case are generally distinguishable from the benefits in a wrongful pregnancy case

288. *Phillips II*, 508 F. Supp. at 551. See generally Comment, *Wrongful Birth Damages*, *supra* note 193.

289. *E.g.*, *Jacobs*, 519 S.W.2d at 849; *Dumer*, 69 Wis. 2d at 776, 233 N.W.2d at 377.

290. *Schroeder*, 87 N.J. 53, 432 A.2d 834. Other courts have expressly disallowed emotional damages. *E.g.*, *Becker*, 46 N.Y.2d at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901 (citing *Howard*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363), while other courts have not addressed the issue. See *Dumer*, 69 Wis. 2d at 776, 233 N.W.2d at 377.

291. *Robak*, 658 F.2d at 478.

292. See RESTATEMENT (SECOND) OF TORTS § 920 (1977).

293. *Becker*, 46 N.Y.2d at 414-15, 386 N.E.2d at 814, 413 N.Y.S.2d at 912. See *Berman*, 80 N.J. at 432, 404 A.2d at 14.

294. *Berman*, 80 N.J. at 432, 404 A.2d at 14.

295. *Becker*, 46 N.Y.2d at 414-15, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

296. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

297. See note 211 and accompanying text *supra*.

298. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (wrongful pregnancy claim involving healthy child).



because the benefits in a wrongful birth claim depend on the extent of the child's affliction.<sup>299</sup> Thus, although the benefits rule is a legitimate element of the calculation of damages, it should not restrict the scope of permissible damages. "In calculating plaintiff's damages, any benefits they derive from defendant's negligence may properly be offset against the detriments which flow from that conduct, in accordance with traditional tort principles."<sup>300</sup> Because the benefits at issue are essentially emotional in nature, the principle would seem to apply primarily to the parents' mental suffering and emotional damages. In any case, "[b]ecause at least some damages are cognizable at law, . . . [a] motion for judgment on the pleadings [in a wrongful birth claim] may not be granted for lack of damages."<sup>301</sup>

#### IV. POLICY CONSIDERATIONS

Despite the conformity of wrongful life and wrongful birth claims to the conventional tort framework, these claims have received markedly different treatment in the courts, apparently based on divergent policy considerations.<sup>302</sup> Thus, a thorough examination of these causes of action necessitates a comparison of the policy considerations underlying each of the claims.

Recent wrongful life decisions are candid in their recognition that "[t]he most potent arguments . . . against 'wrongful life' claims are predicated on public policy considerations."<sup>303</sup> Furthermore,

[a]lthough these arguments are phrased in varying terminology—the "impossibility" of determining damages based on a comparison of defective existence with nonexistence, . . . the absence of recognized damages, . . . the metaphysical, theological, or philosophical nature of the issues, . . . the lack of a "justiciable" issue, . . . or the absence of a legally "cognizable" cause of action . . . — they essentially focus on the "precious-

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299. *Becker*, 46 N.Y.2d at 414-15, 386 N.E.2d at 814, 413 N.Y.S.2d at 912.

300. *Phillips II*, 508 F. Supp. at 555. "The complexity of this balancing process is not, however, directly relevant to the validity of the cause of action . . ." *Id.* (citing *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931)).

301. *Gildiner*, 451 F. Supp. at 696.

302. Compare *Phillips I*, 508 F. Supp. at 543 (policy considerations militate against recognition of wrongful life claims) with *Phillips II*, 508 F. Supp. at 551 (policy considerations support recognition of wrongful birth claims).

303. *Phillips I*, 508 F. Supp. at 543.

ness of human life."<sup>304</sup>

Although the policy considerations applied to wrongful life claims have remained relatively unchanged,<sup>305</sup> the policy considerations applied to wrongful birth claims have undergone a startling transformation. Rather than focusing on the sanctity of human life, the courts have begun to emphasize societal concerns in ensuring accurate prenatal testing<sup>306</sup> and deterring professional negligence.<sup>307</sup> In light of *Roe v. Wade*, some courts have suggested that failure to recognize wrongful birth or wrongful pregnancy claims could "impermissibly burden the constitutional rights involved in conception, procreation, and other familial decisions."<sup>308</sup> Although a few courts have advanced similar arguments in wrongful life cases,<sup>309</sup> the overwhelming majority of jurisdictions maintain this curiously dichotomous approach to the policy considerations underlying what ostensibly are closely related claims. The inconsistency in this approach is apparent: if the child's assertion that nonexistence would be preferable to his defective existence is rendered uncognizable by the sanctity of life principle, why must the parents' claim be treated differently? Both claims are premised on the allegation that the physician's negligence precluded an informed parental decision to avoid the child's birth and thus injured the parents and the

304. *Id.* (citations omitted). The court also described certain other policy arguments raised by the cases, such as the opportunity for fraudulent claims, the possibility of a substantial increase in litigation, and the "perceived preemption of legislative prerogative in recognizing . . . new cause[s] of action," as "merely cumulative to the more fundamental policy . . . —the preciousness and sanctity of human life." *Id.*

305. Although the antiabortion component of the policy argument in *Gleitman* has assertedly been abandoned, *e.g.*, *Berman v. Allan*, 80 N.J. at 431, 404 A.2d at 14, the component of the policy argument focusing on "the preciousness and sanctity of human life," *Phillips I*, 508 F. Supp. at 543, remains essentially unchanged from 1967 to the present. Compare *id.* with *Gleitman*, 49 N.J. at 31, 227 A.2d at 693.

306. *Gildiner*, 451 F. Supp. at 696.

307. *Id.* See *Berman*, 80 N.J. at 432, 404 A.2d at 14.

308. *Phillips II*, 508 F. Supp. at 550. *E.g.*, *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). See, *e.g.*, *Troppi*, 31 Mich. App. at 253, 187 N.W.2d at 517.

309. *Curlender*, 106 Cal. App. 3d at 821, 165 Cal. Rptr. at 483 (noting "that considerations of public policy should include regard for social welfare as affected by careful genetic counseling and medical procedures," *id.* at 827, 165 Cal. Rptr. at 486-87, and "that there should be a remedy for every wrong committed," *id.* at 831, 165 Cal. Rptr. at 489"); *Park*, 60 A.D.2d at 88, 400 N.Y.S.2d at 114 (noting that *Roe* creates "a public policy consideration which gives potential parents the right, within certain statutory and case law limitations, not to have a child").

child; both claims assume that, under some circumstances, the burdens imposed by defective existence outweigh its benefits, whether to the parents or the child.

One possible explanation for this inconsistency is residual opposition to abortion, despite the Supreme Court's opinion in *Roe*. The antiabortion policy espoused so vigorously in earlier cases,<sup>310</sup> particularly in light of the current fervor of antiabortion sentiment,<sup>311</sup> suggests that a policy opposing abortion—whether theological, philosophical, or moral in nature—may constitute an important, though tacit, element in the consideration of wrongful life claims. In the context of wrongful birth claims, this policy is displaced by certain well-established parental rights concerning conception and procreation;<sup>312</sup> in the context of wrongful life claims, however, the child, whose constitutional rights are severely curtailed during fetal development, does not himself possess any established right, constitutional or otherwise, that counterbalances or overcomes the extrinsic antiabortion policy that is perceived as militating against wrongful life claims. That is to say, the parents can assert a constitutional right to abort the fetus or to avoid conception, but the child does not have an analogous right *not* to be born.<sup>313</sup>

This conclusion draws inferential support from judicial action in certain other areas. In DES cases,<sup>314</sup> the plaintiffs are, at least to some extent, asserting that nonexistence would be preferable to life burdened by the drug-induced carcinoma, since the

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310. *E.g.*, *Gleitman*, 49 N.J. at 30-31, 227 A.2d at 693; *Stewart*, 35 A.D.2d at 532, 313 N.Y.S.2d at 503; Note, 4 HAMLINE L. REV. 59, 106 (1980).

311. Parness, *Social Commentary: Values and Legal Personhood*, 83 W. VA. L. REV. 487, 488 (1981). See, e.g., H.R. REP. NO. 294, 96th Cong., 1st Sess. (1979); H.R. REP. NO. 51, 96th Cong., 1st Sess. (1979); S. REP. NO. 22, 96th Cong., 1st Sess. (1979) (proposed federal legislation purporting to endow fetuses with constitutional personhood under the Fifth and Fourteenth Amendments to the United States Constitution); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Lynch, *The National Committee for a Human Life Amendment, Inc.: Its Goals and Origins*, 20 CATH. LAW. 303 (1974); Note, *Abortion Conscience Clauses*, 11 COLUM. J.L. & SOC. PROB. 571 (1975).

312. Under *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the constitutional right of privacy that protects the decision to abort a fetus inures to the mother; under *Griswold v. Connecticut*, 381 U.S. 479 (1965), the constitutional right of privacy that protects familial decisions concerning conception and procreation is held by both parents.

313. *Gleitman*, 49 N.J. at 63, 227 A.2d at 711.

314. See notes 171-173 and accompanying text *supra*.

drug was prescribed in high-risk pregnancies "to prevent possible miscarriages."<sup>315</sup> However, the courts have raised no objections to damages in DES cases, arguably because of a perceived distinction between "artificial" eugenic abortions, which trigger the misplaced fear of "a 'Fascist-Orwellian societal attitude of genetic purity,'"<sup>316</sup> and "natural" spontaneous abortions or miscarriages. Similarly, in those cases in which the physician's negligence actually causes the congenital defect rather than merely precluding the opportunity to avoid the child's birth,<sup>317</sup> the child's assertion that he would have been better off never having been born is not viewed with suspicion.<sup>318</sup> At least in the context of conventional prenatal torts, a child apparently does have a "right to begin life with a sound mind and body."<sup>319</sup>

Despite this subtle and inconstant distinction between wrongful life claims and other prenatal torts, certain "scientific and technological advances . . . may eventually provide a new perspective from which to analyze"<sup>320</sup> the policy considerations barring wrongful life claims.

For example, one could hypothesize a technological breakthrough in genetic engineering, focusing perhaps on the transduction or transformation of chromosomal material through recombinant DNA ("gene-splicing") techniques, controlled mutagenesis, or microsurgery, or in euphenics, which would allow a particular genetic defect to be treated *in utero* during the early stages of pregnancy. Thus, "but for" the physician's negligence in failing to detect and treat the abnormality, the

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315. See *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1006 (D.S.C. 1981). For a response to this argument, see Abrahams & Musgrave, *supra* note 171, at 702.

316. *Gildiner*, 451 F. Supp. at 695.

317. *E.g.*, *Scales*, No. A-79-CA-70. See note 143 and accompanying text *supra*.

318. In *Scales*, the plaintiff asserted that the physicians' negligence in vaccinating his mother for rubella while she was pregnant produced the congenital rubella with which he was afflicted, *id.* at 2; the plaintiff also asserted that the physicians' negligence in failing to inform his mother of the fetal risks associated with maternal rubella infections prevented a decision to abort the fetal plaintiff, *id.* at 2-3. The court found both of these assertions to be true, *id.* at 5-6, and awarded the plaintiff \$625,000 without specifically allocating the award between the prenatal tort and wrongful life claims. *Id.* at 7. The court did not dismiss the wrongful life claim from the complaint and apparently predicated recovery, at least to some extent, on the conclusion that "the Government's negligence . . . was a proximate cause of . . . [the plaintiff's] mother not terminating her pregnancy and of . . . [the plaintiff] being born with congenital rubella syndrome." *Id.*

319. *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

320. *Phillips I*, 508 F. Supp. at 543.

plaintiff could have lived a normal life. Under these hypothetical circumstances, a claim that is currently viewed as one for "wrongful life" involving the comparison of a defective existence to nonexistence begins to exhibit marked similarities to a concededly cognizable cause of action—a tort *en ventre sa mere*.<sup>321</sup>

This hypothetical demonstrates once again the crucial impact of antiabortion policy: if medical malpractice in genetic counseling or prenatal testing results in the failure to diagnose a congenital defect that could be treated *in utero*, the infant plaintiff clearly has a prenatal tort claim; conversely, if medical malpractice in genetic counseling or prenatal testing results in the failure to diagnose a congenital defect that can be "treated" only by eugenic abortion, the infant plaintiff's claim for wrongful life is uncognizable. Thus, the primary and perhaps only distinction between wrongful life claims and other prenatal torts is the unavailability of *in utero* treatment in the circumstances of the former; the only alternatives are defective birth or eugenic abortion.

## V. CONCLUSION

Both wrongful life and wrongful birth claims, which exhibit the requisite elements of duty, breach, proximate cause, and damages, fall within the traditional tort framework. The marked divergence in judicial reaction to these claims is attributable to policy considerations focusing on "the preciousness and sanctity of human life."<sup>322</sup> This policy is displaced by the parents' constitutional rights concerning conception and procreation, but the child does not presently possess a countervailing right that supplants the policy disfavoring abortion.

The preeminence of policy considerations is inherent in the very definition of wrongful life claims, which are distinguished from conventional prenatal torts by the unavailability of *in utero* treatment that would be less drastic than eugenic abortion. The impasse between these policy considerations and the traditional tort principle that liability should follow the wrong-

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321. *Id.* at 543 n.12 (citations omitted).

322. *Id.* at 543.

doer<sup>323</sup> could be alleviated in three ways. First, to the extent that the scientific and technological advances postulated in *Phillips*<sup>324</sup> actually occur, currently untreatable congenital defects may become susceptible of *in utero* treatment; these advances would transform wrongful life claims into conventional prenatal tort claims. Second, the "cultural lag" between prenatal testing technology, particularly amniocentesis, and morality may resolve itself "as beliefs and social mores 'catch up' to technological advances."<sup>325</sup> Under this view, societal recognition of "the high degree of accuracy and predictability"<sup>326</sup> in prenatal testing will eventually result in a readjustment of popular morality<sup>327</sup> that presumably would minimize policy objections based on antiabortion considerations. Finally, the judiciary's traditional authority to delineate the scope of common-law negligence could be employed to endow fetuses with a limited right not to be born by drawing on a child's "right to begin life with a sound mind and body"<sup>328</sup> and, derivatively, on the parents' procreational rights.<sup>329</sup> This limited right could then displace antiabortion policy considerations in wrongful life cases in appropriate circumstances, as does the parents' constitutionally protected right of privacy in the wrongful birth context. Because the physician's negligence may confer benefits as well as burdens, damages in both wrongful life and wrongful birth claims should be mitigated "in accordance with traditional tort principles."<sup>330</sup> As with wrongful birth claims, recognition of wrongful life claims would promote societal interests in genetic counseling and prenatal testing,<sup>331</sup> deter medical malpractice,<sup>332</sup> and at least partially redress a clear and undeniable wrong.

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323. *Fitzer v. Greater Greenville S.C. YMCA*, \_\_\_ S.C. \_\_\_, \_\_\_, 282 S.E.2d 230, 231 (1981).

324. *Phillips I*, 508 F. Supp. at 543 n.12.

325. *Peters & Peters*, *supra* note 11, at 876.

326. *Id.*

327. *Id.*

328. *Smith v. Brennan*, 31 N.J. at 364, 157 A.2d at 503.

329. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

330. *Phillips II*, 508 F. Supp. at 550 (citing RESTATEMENT (SECOND) OF TORTS § 920 (1977)).

331. *Gildiner*, 451 F. Supp. at 695-96.

332. *Id.* See *Berman*, 80 N.J. at 432, 404 A.2d at 14.

